United States Court of Appeals

for the Second Circuit

APPENDIX

74-1219

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1219

UNITED STATES OF AMERICA,
Respondent,

—v.—

ARIEL POMARES and ANTONIO VECIANA,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANTS' APPENDIX
Volume II—Pages A-462 to A-803

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(Jury not present.)

MR. LITTLEFIELD: Your Honor, in view of the questions on the statement, I am not sure whether I I shouldn't offer the statement in some sense.

THE COURT: Not now. I willl give you a chance on that.

(Jury enters courtroom.)

MR. LITTLEFIELD: The Government has no further redirect, no further questions of this witness.

THE COURT: You are excused.

(Witness excused.)

MR. LITTLEFIELD: The Government calls as its next witness Mr. Figueroa.

G U I L L E R M O F I G U E R O A, a witness called by the Government, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. LITTLEFIELD:

Q Mr. Figueroa, I am Mr. Littlefield. Until today we had never met, is that correct?

A Yes, sir.

Q Is your English okay so that you will be able to understand my questions?

A Yes, sir.

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Q Keep your voice loud, because you can see we have a big courtroom.

Where do you live, Mr. Figueroa?

A I live in Miami at 1620 Southwest 25th Avenue, Miami, Florida.

Q How long have you lived in Florida?

A Eight years.

Q Where did you live before that?

A Well, I came from Cuba.

Q You came to Miami. Are you now married in Miami?

A Yes, sir.

Q Do you have any children?

A Yes, sir.

Q How many?

A Four.

Q What is your job?

A I am a general contractor.

Q What kind of a company?

A Canvert Development Corporation.

Q What kind of work do you do?

A I am a builder. You know, I am in charge of the project.

THE COURT: What kind of things do you build, sir?

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THE WITNESS: Condominium.

THE COURT: We northerners hear about those things. What are those, apartments?

THE WITNESS: Apartments for sale.

THE COURT: All right. That helps us out.

Q Do you know Augustin Barres?

A Yes, sir.

Q How long have you known him?

A Two years.

Q Do you know Ariel Pomares?

A Yes, sir.

Q How long have you known him?

A A year.

Q How do you know Mr. Pomares?

A Through Barres.

Q How did you know Mr. Barres?

A Through my father-in-law. Mr. Barres and my father-in-law, they are partner.

THE COURT: What is your father-in-law's name?

THE WITNESS: Mr. Lopez.

THE COURT: What is his first name?

THE WITNESS: Jose.

Q What kind of business is it that they are partners in?

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A Well, they are in construction business.

Q Do you know Mr. Veciana, Antonio Veciana?

A No.

Q Directing your attention to July of last year, did you have occasion to go to an apartment at the Italian Village near the Miami International Airport, as I understand it?

A Yes, sir.

Q Could you tell the Court and jury what happened, why you went there and what happened?

A Well, the reason we went over there that day is because my father-in-law, he want to build a barbecue deck, and I remember when a year before that, you know, they were building seven different building apartments close to the airport where Barres was staying. I remember they build over there a barbecue deck, and in that project is when my father-in-law and Mr. Barres get together as a partner with other people to build around maybe 10 buildings over there. I remember I -- when they start that project, they build the barbecue deck and I told my father-in-law, before we build one, we better go over there and check how they did it, you know. So that day we took off and we went over there, so when we --

THE COURT: Around what time of day was this?

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THE WITNESS: Noontime.

A (Continuing) So when we get there, you know, we saw Mr. Barres' car parked on his apartment, you know.

Q Was that in front of his apartment?

A In front of his apartment.

Q Where is the apartment in the building? On what floor is it?

A The first floor.

Q Does it have sort of a patio or balcony out front?

A They have a small balcony, yes, with a sliding door, and the car was in -- his car was parked right in front of the apartment. So when we -- it is the first building, really, and when we drive in the project, we saw the car. So we come and we say how about saying hello to Mr. Barres.

When we get there, we park, and when we went into the building, I knock on the door, I remember, and when I knock on the door I saw Mr. Ariel Pomares standing up ready to go, and by that time I didn't know Mr. Poinciana, and then they took off, and we stay and we sit down for 15 -- 10, 15 minutes with Mr. Barres, talking, and that's it.

Then I remember we talk about -- I ask about

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Mr. Poinciana and I remember that we mentioned that he used to -- he was in the magazine.

MR. GARBER: I object as being clearly hearsay.

THE COURT: You say somebody by the name of Mr. Poinciana, where did you see him?

THE WITNESS: I saw him in the apartment.

THE COURT: When you came in? When you knocked on the door?

THE WITNESS: Yes, with Mr. Ariel Pomares.

THE COURT: So as I understand it, you came in and as you and your father-in-law came in, you say that Mr. Barres and Mr. Poinciana went out -- no, who went out?

THE WITNESS: Mr. Poinciana and Mr. Ariel Pomares, they went out, and we stay in and we stayed there for 10, 15 minutes, talking to Mr. Barres.

Q Did you talk to him about boxing, about anything to do with boxing?

A No, no. We talk with Mr. Barres, you know, about his future plan and in the construction and his business, you know.

Q Do you see in the courtroom, if you can look around the courtroom, the people you just referred to?

A Yes, sir.

Q Could you point out the two people you referred

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to?

A Yes.

MR. GARBER: Excuse me.

THE COURT: Sustained. Point out anybody you see in the courtroom that you say you saw at the apartment, Mr. Barres' apartment. Would you do that?

THE WITNESS: Yes, sir. Him and Ariel.

MR. LITTLEFIELD: May the record reflect that the witness pointed to the Defendant Veciana and the Defendant Pomares.

THE COURT: All right.

Q The first man you pointed to, do you know what his name is?

A Well, now I know.

Q What do you think it is?

A I mean --

Q You may not know it exactly.

A Veciana, whatever. Poinciana.

THE COURT: You said Poinciana a while ago. Something like that, but you are not sure?

THE WITNESS: Yes.

THE COURT: But you say this is the gentleman whom you saw?

THE WITNESS: Yes.

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Q Had you ever seen him before?

A I don't remember.

Q When you got there, when you went to the apartment, where in the apartment at the point that you got to the door were Pomares and Veciana?

A They were in the living room.

Q When you came in, what happened?

A They stand up and walk out.

Q Did they greet you, or anything?

A Did they what?

Q Did they greet you or say hello, or anything?

A No.

Q They just went out?

A Yes. They just stand up, and even I didn't know what was going on, so I --

MR. GARBER: I object and move to strike.

THE COURT: Don't tell us that. Just answer the question. They just went out?

THE WITNESS: They just went out.

Q They didn't say anything to you?

A No, sir, not a word.

Q Mr. Pomares you had known for over a year, is that right?

A Around a year.

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Q Do you remember the date of this occurrence?

A Yes.

Q First, do you remember what day of the week it was?

A Saturday.

Q Do you remember the date?

A 21st.

Q How do you remember that was the date?

A How I remember? Well, I am going to be honest. I remember that because we mentioned a few hours ago. It was very hard for me to remember the exact date and the exact, you know --

Q Did you go to the grand jury?

A Yes, sir, I went.

Q To the grand jury in Florida?

A In Florida.

Q A few days later?

A They asked me, you know, if I am willing to go, you know, and I went over there and I told the truth, like I am telling you right here.

Q Would it refresh your memory as to what the -- do you know the dates you went to the grand jury?

A No, I don't remember, sir.

Q If I showed you your testimony, would that

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remind you of the date, perhaps?

A Yes, sir.

MR. GARBER: May I inquire, is the purpose of showing the witness this merely to determine the date?

THE COURT: I take it so.

MR. GARBER: If so, we would stipulate that the transcript would reflect that it was the 27th of July.

Q Do we know what day of the week you went to the grand jury on was? Do you remember if it was --

A Maybe Monday or --

Q The 27th of July would be --

MR. GARBER: Let's don't testify, Mr. Littlefield.

THE COURT: Look at that. Does that refresh your recollection that it was the 27th?

THE WITNESS: Yes, sir.

Q July 27th?

A Yes, sir.

MR. LITTLEFIELD: Your Honor, would the Court take judicial notice that the 27th was a Friday, if the 21st was a Saturday the 27th this would be a Friday.

THE COURT: If you gentlemen all agree on a calendar, I will agree with whatever you agree on on that. Sure. Do you have any questions about that, the date? The day of the week?

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MR. GARBER: No, I have no difficulty with that at all.

THE COURT: Do you have?

MR. BOITEL: No.

Q Was it the previous Saturday you were testifying? If you went on the 27th and that was a Friday, would that have been the previous Saturday that you met, if you know, if you remember?

THE COURT: It was the previous Saturday that you went to Mr. Barres' apartment?

THE WITNESS: Yes.

By the day I went to the apartment and by the day they called me was very close, I mean.

MR. LITTLEFIELD: I have no further questions.

THE COURT: Any questions, Mr. Garber?

MR. GARBER: Just very few.

CROSS EXAMINATION

BY MR. GARBER:

Q Mr. Figueroa, what was the weather condition on that date that you went to the apartment on July 21st?

A It was raining.

Q Correct me if I am wrong, but it is my recollection that in response to questions by the attorney for the Government you said that when you first arrived at the

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door you saw that Mr. Pomares was standing up as though ready to go; is that right?

A I said Ariel Pomares was right by the door ready to go.

Q Ready to leave?

A Ready to leave, yes.

Q At that point you came into the apartment and Mr. Pomares left, is that right?

A Yes.

Q And Mr. Veciana left with him, is that correct?

A Yes.

Q Wasn't it your impression that as a matter of fact before you got in there they were about to leave anyway

MR. LITTLEFIELD: He just objected when the man on direct testimony wanted to give his impression. Go ahead and let him give his impression.

THE COURT: Did you think they were leaving when you entered the apartment, anyway?

THE WITNESS: To be honest with you, I don't know if they were ready to leave or --

Q Or had just gotten there?

A It is very hard. It is very hard to say if they were ready to leave or they saw me and they wanted to leave. They were standing up next to the door, ready

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to leave.

MR. GARBER: Thank you very much.

MR. BOITEL: No questions.

REDIRECT EXAMINATION

BY MR. LITTLEFIELD:

Q You started to say what your impression was -- by the way, was the living room -- was the door to the outside in the living room?

A No, no,no.

Q Because you had said that they were stnding --

A You see, between the door and where they were is around between here and where you are standing right now.

Q If the door is where you are, where was Mr. Pomares, where I am?

A Yes, sir.

Q Where was Mr. Veciana?

A He was to the right because you have a small -- like a small foyer, you know, and then you have the living room together and the kitchen is right here. So he was standing in the other -- from the door was very hard to see him.

Q You started to say what it was that your impression was when you came in there as to what --

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A Yes. The impression --

MR. GARBER: Just a second, now.

Q Just testify as to what the impression was.

MR. GARBER: May I be heard on my objection, Mr. Littlefield?

THE COURT: No. I think I will let him answer. What was your impression when you came in?

THE WITNESS: The impression is different. The impression is like, I know Ariel, you know, I mean, we are not friends or we are not -- we know -- like I told you, I saw him three times in my life, maybe four times in my life, you know, and he always say hello or say something to me because I am friendly person, and I remember that day he doesn't even say anything to me. He just stand up -- he no stand up, he just walk out, and I surprise myself how he doesn't say anything to me.

This is the impression that I have. When I walk -- I feel cold weather.

THE COURT: Did you say anything to him?

THE WITNESS: No, I don't say anything to him.

THE COURT: You didn't say anything to him?

THE WITNESS: Nothing.

Q Why didn't you say anything to him?

A Because, I mean, if he doesn't say hello to me,

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if I go to a place and nobody say hello to me, why I should say anything?

Q Did Mr. Veciana say hello to you?

A No, he doesn't know me to say hello or anything like that.

Q Did he acknowledge you or gesture to you or anything?

A No. He doesn't know me --

THE COURT: They just walked out?

THE WITNESS: They just walked out.

MR. GARBER: I have one question, if the Court will indulge.

THE COURT: Okay.

RECROSS EXAMINATION

BY MR. GARBER:

Q Your testimony just now as you didn't say anything to them because you didn't want to talk to people who didn't want to talk to you, is that right?

A Well, if they don't say hello to me, why I should say hello.

Q Do you recall giving your testimony before the grand jury on July 27, 1973, at which time you appeared in Dade County before the grand jury for the Southern District of Florida? Do you remember that?

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A Yes, sir.

Q Do you remember making the statement on page 5 of the transcript, "So Veciana and Ariel was there. We went to the apartment and saw -- say hello to everybody, hi, hi."

Do you remember making that statement under oath?

A I don't remember.

Q Perhaps if I showed you the page.

THE COURT: Show it to him.

MR. GARBER: Let the record reflect that I am showing a copy of the transcript of the appearance of this witness before the Federal Grand Jury on July 27, 1973 in the Southern District of Florida, page 5 thereof, to the witness.

(Pause.)

Q Do you remember making that statement?

A Well, say hi, hi, well, I don't remember sir.

Q Pardon?

A I don't remember.

Q But you do remember testifying before the grand jury?

A Yes. If it is there, I --

Q If it is there, you what? If it is there, you

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made it?

A I made it.

Q So then you were in error when you testified before this Court and this jury that you had no statement whatsoever on that date, is that correct?

MR. LITTLEFIELD: Objection.

THE COURT: I sustain the objection to that. Having looked at that, what is your present testimony? Do you recall when you went into the apartment, did you say anything to Pomares and Veciana, as you sit here now?

THE WITNESS: You see, the man who opened --

THE COURT: You can answer that yes or no. You either do or you don't.

THE WITNESS: I don't remember, sir.

MR. GARBER: Thank you.

MR. LITTLEFIELD: Just so it is complete, your Honor, I will read the full amount and see if he remembers the full amount.

"So Veciana and Ariel was there. We went to the apartment and saw -- say hello to everybody, hi, hi. And what surprises me is that as soon as we arrived they just stand up and go out. That is Pomares and Veciana get up and walk out at once. You know by that moment there is nothing wrong, you know, what can I say?"

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MR. GARBER: I am asking, is this a question he is propounding to the witness?

THE COURT: I think not. I guess he is going to ask him, did he say that.

Did you say what he read?

THE WITNESS: Yes.

MR. LITTLEFIELD: That is all.

RECROSS EXAMINATION

BY MR. BOITEL:

Q Do you recall during that same grand jury testimony, continuing on from where Mr. Littlefield left off just now, you testified --

MR. LITTLEFIELD: Perhaps we should offer the whole thing, your Honor.

THE COURT: I don't want to offer the whole thing. I don't think you need to do that.

MR. BOITEL: If I may be permitted --

THE COURT: What is it you want to ask?

BY MR. BOITEL:

Q "Q. That is Pomares and Veciana got up and walked out?

"A At once, you know, by that moment, is nothing wrong, you know, what can I say, you know, so they say, well, I have to go. Ariel say that."

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Did you hear him say that?

A Yes, he say "I got to go."

Q So he did say something, didn't he?

A He say something, not to me.

Q He did say something, didn't he?

A Yes.

Q You heard him say it, did you not?

THE COURT: You heard him say, "I got to go," but he didn't say anything to you, is that the point?

THE WITNESS: No, he didn't say anything to me. I am nobody over there. I am nobody over there. You see what I mean?

Q No, I don't.

THE COURT: I think so. I think we can leave the record.

Q You did hear him say that he had to go? Do you recall that?

A Can I express myself?

THE COURT: No. I think we ought to be careful about this. You did say to the grand jury that Ariel said, "I got to go."

THE WITNESS: But he didn't talk to me. He say in the room --

Q It was a general statement in the room?

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A A general statement.

REDIRECT EXAMINATION

BY MR. LITTLEFIELD:

Q More specifically, who was it made to?

A Maybe to Barres or Lopez. You know, to Barres.

MR. LITTLEFIELD: I have no further questions.

THE COURT: Okay. Thank you, Mr. Figueroa. You are excused.

(Witness excused.)

MR. LITTLEFIELD: The Government will call Mr. Lopez.

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GUSTAVO HOFFMAN, was duly sworn as an interpreter.

JOSE RAMON LOPEZ, called as a witness by the Government, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. LITTLEFIELD:

Q Mr. Lopez, where do you live?

A (In English) Miami.

Q Would you prefer to testify in English or Spanish?

A (In English) No, no. Maybe I misunderstand something.

THE COURT: Let's do it through the interpreter.

Q Even if you understand the question wait until it is interpreted.

A (In English) In Spanish it is better.

Q You live in Miami; is that correct?

A Yes, sir.

Q Where do you live in Miami?

A 1620 Southwest 25th Avenue.

Q And do you live there with a family?

A Yes, sir.

Q What is the family?

A My wife lives with me and in a lower floor my

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daughter with her husband.

Q And your daughter's husband is Mr. Figueroa; is that right?

A Yes, sir.

Q Now, are you originally from Cuba?

A Yes, sir.

Q And when did you leave Cuba?

A November 13, 1961.

Q And how did you leave Cuba?

A In Pan American Airways.

MR. BOITEL: Can the witness be asked in his Spanish responses that he do it louder?

(The Court instructs the witness in Spanish.)

Q And where are you employed? What is your job?

A I am in the building trade and real estate work.

Q And what kind of things do you do specifically?

A I build together with my partners and I sell real estate and mortgages.

Q Who are your partners?

A Ernesto Cespedes, Julio Chut, and Augustin Barres.

Q Did there come a time last year when you went -- in July of last year when you went to Mr. Barres' apartment at Italian Village, an apartment at Italian Village?

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A Yes, sir.

Q And why did you happen to go there?

A I went with my son-in-law to look at a dock that had been built in that complex to copy for a building I was engaged in.

When we went by we saw them through the open glass doors, so we stopped to say hello.

Q Who did you see through the open glass doors?

A We saw Barres, Pomares and Veciana.

Q Did you drive the car then up to the front of the apartment?

A Yes, in the parking lot.

Q And did you then get out of the car and go to the apartment?

A Yes, sir.

Q And what happened then, if you can just explain what happened?

A We came in and we said hello. I sat down. I sat down next to Veciana and then Pomares left and right afterwards Veciana.

Later on my son-in-law and I stayed for a few minutes talking to Mr. Barres. It was a light rain and we wanted to leave quickly before the rain became harder. That is all.

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Q Do you see in the courtroom the people that you saw in that apartment or any of the people that you saw in that apartment?

A Yes, Mr. Pomares and Mr. Veciana.

MR. LITTLEFIELD: May the record reflect that the witness -- perhaps we should get this exactly.

Q Would you describe where each is sitting so there will be no question.

MR. LITTLEFIELD: May the record reflect that the witness has pointed to the two defendants.

Q Do you remember where there was conversation, you left, or what happened?

A No, there was no conversation. I didn't talk to them because they left.

MR. LITTLEFIELD: I have no further questions.

CROSS EXAMINATION

BY MR. GARBER:

Q Mr. Lopez, about how much time passed while you and your son-in-law were in the apartment with Barres, Pomares and Veciana?

A With Veciana and Pomares almost none whatsoever since they left right away. With Barres we stayed about five minutes longer talking.

Q About five minutes.

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What, if anything, was said when you first came in the apartment, either by you or the persons in the apartment to you?

A Nothing. We just said hello.

Q Who said hello?

A We came in as a group and we just said hello and what is going on.

Q Did Mr. Veciana say hello to you?

A Yes. I sat next to him.

Q Did Mr. Veciana say hello to your son-in-law, Mr. Figueroa?

A I don't really remember. I imagine he did but I don't remember.

Q But at any rate you remember him saying hello to you?

A Yes.

Q Do you remember ever having spoken with Mr. Veciana on any earlier date or later date?

A Yes. Before that date I had seen him several times and said hello to him.

Q Do you recall any conversation between yourself and Mr. Veciana pertaining to a bag manufacturing business in Bolivia?

A Once at the Crossway Hotel.

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Q Was that, as far as you recall, a business relating to Mr. Barres and Mr. Veciana?

A I would think so. They were talking about it and I didn't participate in it.

Q Who was they that were talking about it?

A Barres and Veciana were talking about it.

Q About a plastic bag manufacturing business?

A Yes.

MR. GARBER: Thank you.

CROSS EXAMINATION

BY MR. BOITEL:

Q Mr. Lopez, when you entered the apartment on that day did you greet Mr. Pomares?

A Yes.

Q And did he greet you?

A Yes.

Q How many times have you been to that apartment?

A Several times.

Q More than five times?

A I don't think so.

Q On each time that you went there who was there?

A On those times I went there it was because Augustin called me and I would pick him up and we would go out to discuss business.

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Q Did Barres live there?

A No. He used to stay there often.

MR. BOITEL: I have no further questions.

REDIRECT EXAMINATION

BY MR. LITTLEFIELD:

Q The conversation about the plastic bag business, did you say that was at the Crossway?

A I heard it once at the Crossway.

Q Now, Mr. Garber, who was the first attorney, for Mr. Veciana, asked you whether you had had any conversations with Mr. Veciana before or after this event.

Now, let me ask you a question. Isn't it true that Mr. Veciana came to visit you just a few weeks ago after he heard you were coming to New York to testify?

A He wanted me to come, though I didn't want to come here.

Q And what did that conversation or what was that conversation about at that point?

A He wanted me to be a witness for this case and I told him I was already going to be a witness of what I saw.

MR. LITTLEFIELD: I have no further questions.

THE COURT: Any other questions?

MR. GARBER: No, sir.

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THE COURT: All right, thank you, Mr. Lopez, you are excused.

(Witness excused.)

MR. LITTLEFIELD: The Government calls Mr. Carpio.

F R A N C I S C O C A R P I O, called as a witness by the Government, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. LITTLEFIELD:

Q Mr. Carpio, how old are you?

A 37.

Q And where do you live?

A In Puerto Rico.

Q And who do you live with?

A With my family, my wife and children.

Q And how many children do you have?

A Two.

Q Ate?

A 12 and 13 more or less.

Q And what is your nationality?

A Cuban.

Q And when did you leave Cuba?

A About eight years ago.

Q And how did you leave Cuba?

A In the Liberty flights.

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Q What were they?

A The American flights that were bringing Cuban people to Miami.

Q And did you have a relative in the United States that made it possible for you to come to leave Cuba?

A Assistant.

Q What is your job training?

A I work in the offices of a building company.

Q What is the name of that building company?

A Metro Construction.

Q What is your job there?

A I am in charge of the offices of the accounting, the books, et cetera.

Q Accounting?

A Yes.

Q How long have you worked there?

A About four and a half months to five months.

Q Now, before working at Metro Construction Corporation where did you work?

A With Freca Importers.

Q And how long did you work at Freca?

A About a year and a half, a year and four months.

Q And before that where did you work?

A I worked with Dresser Industries. They sell compressors and tools.

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Q Now, at Freca, what was your job?

A I begun selling in the street. And afterwards I alternated street work with shop work.

Q So at the end you were working in the central place, whatever that was.

A Yes, I would work tending the counter, taking orders by phone.

Q How many employees do you think there were at Freca at the time you were there, roughly?

A About 29, 30, 31.

Q And what was the business of Freca?

A Automobile accessories and parts.

Q Selling them?

THE COURT: Where was Freca Importers, in Puerto Rico?

THE WITNESS: In Road 190. Puerto Rico is an island.

THE WITNESS: Carolina.

THE COURT: You understand the place you worked was in Carolina?

THE WITNESS: That is right, sir.

Q Now, specifically how many hours a week did you work?

MR. GARBER: Your Honor, may I request a proffer

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from the Government as to the materiality or relevance of this witness?

MR. LITTLEFIELD: This is just introductory.

THE COURT: He is entitled to get that.

A Approximately the usual working hours from Monday to Saturday morning, unless there was something extra or special that required my staying overtime or coming in early.

Q Did you go in there early in the morning?

A Yes. Usually I, together with another fellow who worked there, would come there at 7:00 in the morning, 7:15 or a quarter to 7:00.

Q Did Freca sell to someone who owned a car or to gas stations or did it sell wholesale, so to speak, or how?

A The larger volume was in wholesale to gas stations and distributors, but we also sold retail at the counter.

Q What hours did you work on Saturday?

A Usually until noontime.

Q And you came in at 7:00 or so on Saturday?

A Yes, more or less, a quarter to 7:00, 7:15. Maybe one day at 7:30, but more or less.

Q Do you know Augustin Barres?

A Yes, sir.

Q And did you know him when you worked at Freca?

A Yes.

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Q By the way, why did you leave Freca?

A Well, because I got a better job, a lighter job with better salary, and besides Freca sales were going down, had gone down quite a lot.

Q Do you know Ariel Pomares?

A Yes, sir.

Q And do you know him also through Freca?

A Correct.

Q And do you see Ariel Pomares in the courtroom?

A Yes.

Q Can you point him out to the jury, please?

A It is the second man from left to right.

MR. LITTLEFIELD: May the record reflect, your Honor, that the witness has pointed to Mr. Pomares or indicated where Mr. Pomares was sitting.

THE COURT: Yes.

Q Now, do you know or did you ever meet Antonio Veciana? Did you ever meet Antonio Veciana?

A No, sir.

Q Now, on Saturday when you arrived early or when you arrived early normally on Saturday, who else arrived with you?

A Another boy who used to work in the warehouse and some salesmen.

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Q Now, would there be someone there, any telephone operators, regular telephone operators early Saturday morning?

A No. On Saturdays neither the telephone operators or secretary, they didn't work.

Q And did there come a time last year when you received a phone call or you answered a phone early one Saturday morning and it was from Veciana?

MR. GARBER: I would object to the question because it assumes and presumes that this witness --

THE COURT: I think that is right.

Did you receive a telephone call one Saturday morning from a man who said his name was Veciana?

THE WITNESS: That is correct.

Q About what time did this call come in?

A About 7:15 to 7:45, maybe 7:30, perhaps 8:00 o'clock. It was early.

MR. GARBER: What month are we talking about?

MR. LITTLEFIELD: We will get to that in a moment.

Q Now, this was a Saturday?

A A Saturday.

Q Now, you heard the phone ring; is that right?

A That is correct.

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Q Now, could you tell the jury what happened when the phone rang?

A The phone rang and I picked it up. I answered, "Freca, good morning," which is the way we were supposed to answer. Then they asked for Mr. Pomares. I answered that he was not there. Then the caller asked me whether I could locate him. I told him, "Yes, with pleasure."

Q Then what happened?

A I told him I would locate him for him with pleasure. And he said, "Please tell him for my part, my name is Veciana, I received the documents or the papers." I don't remember exactly what the term is.

Q Did he say anything more?

A No. He just said, "Thank you very much."

Q Now, is there any event that you can relate this to in terms of fixing a time for it and a month?

THE COURT: That is an awfully complicated question.

MR. LITTLEFIELD: I will rephrase it, your Honor.

Q Can you determine what month or roughly when this was, this phone call?

A This was during the month of July, about the first or second week. I don't remember exactly.

Q How do you remember that?

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A Because when that call took place it was before Augustin Barres had his problems with his arrest here in New York.

Q Now, after you received this message, what did you do?

A I hung up and immediately called Mr. Pomares and told him that Mr. Veciana had given me this message for him and he said, "Thank you very much."

Q Did you write the message down in any way when it came in?

A At the moment I took the call I wrote down the name of Veciana so that I wouldn't forget it. But after I delivered the message I tore it up.

Q Now, where did you locate Pomares?

A At Occidental Investment.

Q Did you tell the party on the other end of the line where he could contact Pomares, or didn't he ask you?

A As far as I can remember he didn't ask me.

Q And when you gave this message to Mr. Pomares, to Ariel Pomares, what did he say, if you remember?

MR. LITTLEFIELD: May I strike that question?

THE COURT: Yes.

MR. LITTLEFIELD: I will rephrase it.

Q What was the message you gave to Ariel Pomares?

How did you say it to Ariel Pomares?

THE COURT: I think the question is really what did he say to Mr. Pomares after he received the telephone call and called him? What did he say to him?

THE WITNESS: If I remember correctly, I told him, "Ariel, I just received a call from a man named Veciana who asked me to tell you that he received the documents."

Q And what did Mr. Pomares say?

A "Okay, Paco, thank you very much."

Q Did he ask you any other questions about the message?

A Not that I remember.

MR. LITTLEFIELD: No further questions.

May we approach the side bar for just a moment?

THE COURT: Yes.

(At the side bar.)

MR. LITTLEFIELD: Your Honor, Mr. Carpio arrived last night from Puerto Rico and I talked to him late last night and I made some notes of my conversation which I think are my notes for questions but I will be glad to turn them over to counsel. I don't want to do it in the presence of the jury.

THE COURT: We will take a short recess so

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A We started Saturday night and we started early morning on Sunday.

Q Now, before you went to look for him, did you discuss this case with Agent Bruno?

A It was mentioned--

Q Yes or no, sir.

A Yes, sir.

Q Did you read any reports concerning this case?

A No reports, only general conversation.

Q Well, had you heard about a gentleman by the name of Barres?

A Yes, sir.

Q And did you know that Barres had given a statement to the authorities in New York?

A Yes, sir.

Q And isn't it a fact you know that Bruno either had with him or received while he was in Puerto Rico copies of materials concerning the interrogation of Barres?

A I don't recall that part, sir.

Q Well, it was clear to you, was it not, that Bruno was very familiar with the statements which had been given by Barres to the authorities?

A Oh, yes; yes, sir.

Q Now, there came a time when you arrived at the

defendant Pomares' house. Is that right? That was at 12:15 p.m.

A Yes, sir.

Q On Sunday?

A Yes, sir.

Q And who was there?

A There was his wife and I remember a boy about ten and a girl about seven or eight.

Q A son and daughter?

A I beg your pardon?

Q Were you told they were his son and daughter?

A I don't quite understand you, sir.

THE COURT: Were you told that these were his son and daughter, Pomares' son and daughter?

THE WITNESS: Well, his wife later on told me they were.

THE COURT: His wife later on told you?

THE WITNESS: Yes.

THE COURT: When did you first see her?

THE WITNESS: She was the first one to see.

THE COURT: You saw her first?

THE WITNESS: Yes, sir.

Q So now how many police officers were there altogether?

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A Five.

Q Including yourself?

A Yes, sir.

Q Were any of you dressed as police officers or did you have uniforms on or civilian clothes?

A Civilian clothes.

Q Was there a door that you knocked at? How did you gain entry to the house?

A The house have a gate, like an iron gate, and we called and we talked--

Q Was the gate open or closed?

A Closed.

Q Was there a bell?

A N o, sir.

Q How did you attract the attention of the people inside?

A Calling, "Senora Pomares," or "Senor Pomares," and she came out.

Q What did you do then?

A We told Senor Pomares that we wanted--

THE COURT: You mean Mrs. Pomares?

THE WITNESS: Yes.

MR. LITTLEFIELD: I am sorry, is this a telephone call or a gate?

THE COURT: No, this is at the gate.

You called and Mrs. Pomares came out. Is that correct?

THE WITNESS: Yes.

Q She was on the inside of the gate. Is that correct?

A That's correct.

Q And you were on the outside of the gate?

A Y es, sir.

Q And you announced your purpose?

A Yes, sir.

Q What did you say?

A "We are federal officers and we want to talk to Mr. Pomares."

Q Did you show your badge?

A Our badge and credentials.

Q Did all of you show your badges?

A Yes, sir.

Q Did anyone show a weapon?

A No, sir.

Q But everybody had their badges out like this. (Indicating.)

THE COURT: Don't you tell him how he had his badge out. Ask him how he had.

MR. BOITEL: This is cross examination, your Honor.

THE COURT: I know. But don't wave your hand this way.

How did you show your badge?

THE WITNESS: How did I show my badge?

"We are federal officers, Mrs. Pomares." (Indicating.)

Q Were there any people on the street?

A A neighbor, two or three people.

Q Were they able to see you?

A They saw us but no attention was paid to us.

Q You don't know what attention was paid, did you?

A Because we don't make no fuss there, sir.

Q You don't know whether the people knew at the time?

THE COURT: But the question you asked, all he can say is he didn't observe anybody paying attention.

Is that right?

THE WITNESS: That's correct, your Honor.

Q Then you gained entry into the premises. Is that correct?

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A She let us enter the premises and wait at the porch for Mr. Pomares.

THE COURT: How did she do that? You said this was a gate?

THE WITNESS: This is an iron gate.

THE COURT: How did Mrs. Pomares let you in?

THE WITNESS: She opened the gate.

THE COURT: How did she do that?

THE WITNESS: It has a latch and she opened it and invited us. "Will you please sit down and wait?"

Q Where are you at this point, on the other side of the gate or in the house?

A In the porch of the house.

Q Well, is there a yard between the gate and the porch?

A Yes, sir.

Q So you passed through the yard. Is that correct?

A No, no, the yard is behind the porch. It's like the driveway to put the car, sir, and we call it porch when a chair is there and tables.

Q All five of you went there?

A Yes, sir.

Q Then what happened?

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A Mr. Pomares came and we showed him the arrest warrant. We told him that he was under arrest.

THE COURT: When you say, "We," who did that?

THE WITNESS: I did that.

THE COURT: You did that?

THE WITNESS: Yes, sir.

THE COURT: In Spanish?

THE WITNESS: In Spanish.

"Mr. Pomares, you are under arrest," and the Constitutional rights were given to him. Mr. Bruno wrote the consent search and he signed it and all the other officers signed it, too.

Q Mr. Pinol, Mr. Bruno has testified before this Court and jury and he has testified--I am not quoting him now--to the effect that he told my client in a figurative sense, "You are a dead man, we have you cold."

THE COURT: He didn't say that.

MR. BOITEL: I said in a figurative sense.

"We have you dead on the evidence," or something. Do you recall that?

A I recall Mr. Bruno told him that, "You are in very deep trouble. The best lawyer is your own self, you cooperate with the government."

Q What else, if anything, did he say of that nature?

A At the house?

Q Yes.

A I don't recall anything else.

Q Well, eventually you took a car ride, didn't you?

A I beg your pardon?

Q Eventually you took a car ride, didn't you? You were in a car.

A We took him to the district office.

Q And you were in the car?

A I was the driver.

Q Pomares was in the car and Bruno was in the car, right?

A Yes, sir.

Q Was anything else of a similar nature said in the car by Bruno to Pomares concerning what he ought to do or what he ought not to do, concerning the evidence against him or anything of that nature?

A I don't recall the exact words what transpired during the ride from Mr. Pomares' house to the office. I was driving, and the place Mr. Pomares lives is very difficult. There is a lot of cars and there is a brand new project--I mean section of Old San Juan. I noticed there was general conversation there but I don't recall.

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Q You were the interpreter, were you not?

THE COURT: No, he said he was the driver of the car.

Were you the interpreter of the car while this conversation went on?

THE WITNESS: Some parts, because Mr. Pomares, he understood English a little bit.

THE COURT: You thought he did?

THE WITNESS: Well, he say he understood.

THE COURT: He said he understood?

THE WITNESS: Part of what Mr. Bruno told him.

Q Well, do you recall anything else that was said in the car of the nature that we have been talking about for the last minute or two, that is, "You'd better cooperate, we have a lot of evidence against you," or words to that effect?

A I don't recall anything else, sir.

Q While you may not recall specific words, do you recall as to whether such things were said?

A I mentioned to you what Mr. Bruno told him, "The best lawyer is yourself."

THE COURT: That was in the car?

THE WITNESS: Mentioned again in the car.

Q Did he also say that in the house?

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A Yes, sir.

Q He said it twice?

A Yes.

Q Then you arrived at some government agency, is that correct?

A San Juan District Office of the Drug Enforcement Administration, Old San Juan.

Q While you were there did Bruno again make such statements to Mr. Pomares?

A What statements?

Q Statements such as, and I will give you by way of example, "We have a lot of evidence against you, you better cooperate, you don't need a lawyer, your best lawyer is yourself," words to that effect.

A I believe so, he repeated that at the office, yes, sir.

Q During Mr.--what is the other agent, the one who did the questioning here, the name of the police officer who did the questioning?

A Bruno.

Q During Bruno's questioning of Pomares, did Bruno have any documents in his hand?

A Documents? Papers.

Well, he have the arrest warrant and complaint.

Q Did he have any other papers?

A Well, there was many papers but I don't recall exactly.

THE COURT: You understand the question is as to at the time Bruno was questioning Pomares and you were interpreting, did he have any papers at that time in his hand?

THE WITNESS: Yes, sir.

Q And would he look down at the papers and then ask a question?

A From the paper as he questioned, that's correct.

Q I see. Now, we are not talking about the rights, I am not talking about the advise of rights.

A Yes, the questioning.

Q The actual substantive questioning is what we are talking about.

A Yes, sir.

Q And would he ask questions such as this: "Well, Mr. Pomares, didn't this happen and didn't that happen and didn't this happen"; would he ask questions in that way, leading questions at times?

A He was asking if he recall that this happened and that happened, yes, sir.

Q Bruno would say, didn't this happen.

A Yes, sir.

Q And then Pomares would say yes, that happened?

A And explain what happened.

Q And then explain it?

A Yes.

MR. BOITEL: I have no further questions of the witness, your Honor.

MR. LITTLEFIELD: Your Honor, perhaps we have the subject of this arrest warrant and the government would offer it.

MR. BOITEL: I don't care one way or the other. It doesn't seem relevant to anything.

THE COURT: It might be interesting. If you have no objection we'll receive it.

MR. BOITEL: Excuse me, he is saying the warrant. There is a complaint attached to the warrant. Don't stamp it yet, I would like to examine it.

THE COURT: Let me take a look at it.

(Pause.)

MR. LITTLEFIELD: We can take the complaint off if there is a problem.

MR. BOITEL: I will object to the relevancy. I don't know that there is anything in there that presents a problem but I don't see the point in taking a chance.

THE COURT: That is fair enough, but I think I will allow the first portion.

I think I will sustain the objection. It doesn't add anything. We'll keep it marked for identification.

(Government's Exhibit 17 marked for identification.)

MR. LITTLEFIELD: May we mark as Government's Exhibits 18 and 19 the two statements?

THE CLERK: These are already marked.

MR. LITTLEFIELD: They are not marked for the trial.

MR. BOITEL: I don't understand what is happening here.

MR. LITTLEFIELD: I am offering in evidence the consent search signed by Mr. Pomares.

THE COURT: All right.

MR. LITTLEFIELD: And the statement of--the Spanish one and the English one.

THE COURT: Let me see the ones you are offering in.

MR. LITTLEFIELD: Yes, your Honor.

(Government's Exhibits 17 and 18 are marked for identification.)

MR. BOITEL: I object as being irrelevant.

THE COURT: Well, I think I will allow 17. As far as 18 is concerned, unless we have some great Spanish scholars on the jury I don't think I will receive that.

MR. LITTLEFIELD: The reason that is not coming in is that it's in Spanish. Is that correct, your Honor?

THE COURT: That's one of the reasons. I will receive 17 because that has been testified to, but I won't receive 18.

(Government's Exhibit 17 received in evidence.)

MR. LITTLEFIELD: 18 has also been testified to.

THE COURT: I know that.

MR. LITTLEFIELD: I have no other questions of this witness.

THE COURT: All right, any other questions, gentlemen?

MR. GARBER: No, sir.

MR. BOITEL: No, sir.

THE COURT: Thank you, Agent Pinol. You are excused. Hope you get back to Puerto Rico and out of the rain.

(Witness excused.)

THE COURT: We'll take a short recess at this

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point, ladies and gentlemen.

(Jury excused.)

THE COURT: I want to add, 17, I think they can read. 18 I didn't admit because A., it was in Spanish; and B., there was a photograph of Mr. Pomares clipped on it. I didn't think that was appropriate so I didn't let it in. You perhaps didn't even know it was there.

MR. LITTLEFIELD: I didn't see the photograph.

THE COURT: We'll take a recess.

You gentlemen want to look at some papers. Is that right?

MR. GARBER: Yes, your Honor.

MR. BOITEL: I want to again renew my motion based upon the fact that now we know a number of times Bruno was telling my client that he didn't need a lawyer and that he would do himself better without one, etc.

THE COURT: All right. You have made your motion and the jury has heard it and they will undoubtedly consider that.

(Recess.)

* * *

(In open court, jury not present.)

MR. LITTLEFIELD: Let me tell you where we have arrived. There are a couple of questions which I

think will require your decision.

We have a stipulation, a standard stipulation as to the business authenticity of all these documents pretty much, and also with respect to the cocaine, as to the chain of custody and as to what the chemist would say if he were called.

Also a stipulation as to the fact that the phone at Room 111 was registered in Pomares' name. I have a telephone bill, but Mr.Boitel objects to the bill going in. So he has agreed, however, to a stipulation that the telephone is registered in the name of Ariel Pomares.

THE COURT: What is 111?

MR. LITTLEFIELD: The Italian Village apartment.

Also, your Honor, with respect to the scales, besides their being admitted, but that there are cocaine traces on them.

The government will stipulate that a fingerprint analysis was made of the bags, the plastic bags in the suitcase and that no latent fingerprints were removed from it. We couldn't make anything out.

Defendants have agreed to stipulate that Mr. Paterna, Anthony F. Paterna is an attorney in Florida and on August 21st he went to the safe deposit box with Mr. Barres and Mr. Lopez and the said safe deposit box was

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empty of any content whatsoever. He prepared a notorized statement. I don't think we need to introduce that but we can stipulate to the testimony.

Now, I believe I am correct in saying there are two outstanding matters. One is that the government seeks to introduce two checks which were on the account of an Antonio Veciana, payable $1,000, pay to the order of Swiss Bank Corporation, cashed pay to the order of a Swiss Bank Corporation, New York. The government's position is that these two checks are checks payable to whoever it is in Bolivia who had this Swiss bank account that a discussion was made about.

The reason I had proposed to use these on cross examination of Mr. Veciana is because I assumed he would take the stand. Since he is not I have to offer them at this point. They came into his possession and at the time of his arrest he executed a consent search form and these were in his house.

One other issue that is open, your Honor. Just so you see what we have to decide. The government at this point would seek to play the tapes from A to Z of the Barres-Bruno conversations, the Kell Transmitter tapes, all of Barres' voice tapes in other words.

THE COURT: What tapes? Of Barres and Bruno?

MR. LITTLEFIELD: Yes.

THE COURT: Why do you want to do that?

MR. LITTLEFIELD: Because I believe that confirms and corroborates the whole--that aspect of--

THE COURT: When were these tapes taken?

MR. LITTLEFIELD: These are tape recordings made of the conversations between Bruno, the undercover man, and Barres during the various times that they had meetings with each other when they were negotiating for cocaine.

MR. GARBER: We haven't made an issue controverting the fact that this was a transaction. That is totally undisputed.

MR. BOITEL: If these tapes are going to come in it will prolong the trial by a day and a half uselessly. There is a real audibility problem. We tried listening to most of this stuff, that part for which there was equipment available for us to listen to it, and it took us a long time to listen. I couldn't make head or tail of one word. If the prosecutor wants to go to an audibility hearing, fine, but I would object to it because it's just not necessary. It doesn't help anything in this case.

MR. LITTLEFIELD: What is it that they are willing to concede about the tapes?

THE COURT: I don't see where you are heading.

Both Barres and Bruno testified in considerable detail about this. Is this to listen to a tape of what they testified to?

MR. LITTLEFIELD: To give them a sense of how it went.

Are defense counsel willing to stipulate in some sense, that the tapes would basically confirm how Barres described--

MR. BOITEL: I am not going to raise an argument at all to this jury as to whether Barres had negotiations with Bruno, and sold him narcotics. I have no doubt that it happened.

THE COURT: You could care less.

MR. BOITEL: I could care less is right.

THE COURT: I don't think either of them care less.

MR. LITTLEFIELD: If there is a short stipulation, okay.

MR. BOITEL: It's not necessary to stipulate to it.

THE COURT: Why don't you stipulate that all sides stipulate there is no need for listening to the tapes of conversations between Bruno and Barres which have been testified to during the trial?

MR. LITTLEFIELD: Well, except because they are basically what they testified, is the point.

THE COURT: They have already testified to it. So what does it add? That's the point I am making.

MR . LITTLEFIELD: It confirms what they said.

THE COURT: It's self-serving.

MR. GARBER: We don't deny that. We don't deny that the conversations as testified to and the negotiations as testified to in fact took place.

THE COURT: Put it that way then. That would be fine.

MR. LITTLEFIELD: Yes, your Honor.

THE COURT: On these two checks, I don't know what foundation there is for that.

MR. GARBER: These checks are dated May 29, 1972 and June 26, 1972, both dates of which are prior to any of the narcotics transactions whatsoever.

MR. LITTLEFIELD: They are both at the exact time that the first five kilos took place, because it was right after--

THE COURT: The first transaction is not the subject of the indictment. The evidence of these prior transactions is historical and I think I will sustain the objection.

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MR. LITTLEFIELD: Would you examine these checks? In terms of corroboration these are thousand dollar checks made out to or stamped out to the Swiss Bank Corporation just the way Barres said.

MR. GARBER: Are you prepared to offer proof--as a matter of fact, I think the Swiss Bank Corporation is a banking agency here in New York. It is. Now, are you prepared to offer proof that in fact that is a foreign bank and in fact these checks were surreptitiously deposited?

MR. LITTLEFIELD: They are $1,000 a piece. Exactly what Mr. Barres said.

THE COURT: Wait, gentlemen. Please don't get into an argument on this.

MR. LITTLEFIELD: Your Honor, I might have marked them for identification and showed them to Barres in his testimony if I had known Veciana wasn't going to take the stand.

THE COURT: It seems to me I don't know how probative it is. These things are payable to a Swiss Bank Corporation for account 558230. There was evidence that certainly Mr. Veciana was raising money for the Cuba Libre Movement. It takes quite a jump to say that account 558230 was for Bolivia and account something else was for Cuba Libre. I think I will sustain the objection

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MR. LITTLEFIELD: Except they are in that exact amount and just the time of the first purchase in Bolivia.

THE COURT: I think I will sustain the objection.

Now, are we ready for the jury to come in?

MR. LITTLEFIELD: May I just get everybody straight out there, your Honor?

THE COURT: Yes. One other thing I would like to do is this: Rather than have a recess again, on the basis of the evidence I think there is a jury question as to both of the defendants and therefore I would like you to make your motions for the record. Would you like to do that and then we won't have to break up again?

MR. GARBER: Assuming that this is being accepted as though the government has announced that it rests, on behalf of the defendant Veciana we respectfully move for a judgment of acquittal, directed judgment of acquittal on the grounds that the government has failed to offer proof necessary to sustain the allegation with regard to count 1, the conspiracy, in that the government has failed to show that the defendant Veciana was, at the times alleged in count 1 of the indictment, a member of, or participant in a conspiracy whose object was the violation of the narcotics laws of the United States.

Two, with regard to count 2 of the indictment,

it's the position of the defendant Veciana that the government has failed in that it has failed to offer proof substantiating count 2 in that it's dependent on count 1. If the government has failed to prove a conspiracy it can't as a matter of law sustain proof as to count 2. We further adopt each and every motion heretofore made during the course of the trial whether granted or denied and reassert all of those questions.

THE COURT: All right. I will deny your motion and you have an exception. I think there is a jury question with respect to the defendant Veciana. Of course there is a credibility question here which is wholly within the province of the jury.

MR. BOITEL: If your Honor will consider my stating the same exact motion that Mr. Garber made, and in addition thereto I would move for a mistrial upon the ground that there has been proof at this trial of prior transactions not alleged in the indictment, number one.

Number two, my client's 5th and 6th Amendment rights have been violated by the introduction in evidence at this trial of the statement for all the grounds that have been heretofore mentioned to the Court.

Three, your Honor will recall that one of the witnesses, Pinol, had, I think, indicated to the jury that

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my client exercised his 5th Amendment right. I believe that in and of itself is a violation of his rights, and is likely to prejudice the jury against him.

I think those are my points.

THE COURT: I will deny your motion, too, and you have an exception for the same reasons previously indicated.

MR. GARBER: I wish to briefly supplement the motion I made on the further ground that we feel that this defendant Veciana has been prejudiced by the trier of fact being able to consider the matters alleged outside of and prior to the date of the matters set forth in the indictment.

THE COURT: Thank you.

Take a couple of minutes, get them all in and then we'll come back.

(Recess.)

* * *

(In open court, jury not present.)

MR. LITTLEFIELD: I remember one other thing that you asked me to look into, the slip of paper with the figures on it which Barres testified about and which you asked me to look to see if we could find it.

THE COURT: Oh, yes.

MR. LITTLEFIELD: The story on that is that about three or four days ago, Barres, when I questioned him he mentioned the thing and I had the police look as hard as they could to find it. Barres' documents were about this thick, scratch pads of all kinds, and the police officers made a search of it and they weren't able to find it. Yesterday after your further instruction I got the I.R.S. man who is doing some of this, who had some of the papers, and I got everybody who was involved. I haven't been able to find it. I think it's just plain lost.

THE COURT: Your representation is that you made a diligent search and you could not find this piece of paper?

MR. LITTLEFIELD: It has been lost. There were not many people that came into contact with these documents. We don't know how many of his documents are missing. I wanted to clarify and bring that out at this point.

MR. BOITEL: May I go on on that? We have not established that the document is missing.

THE COURT: Well, he has made a diligent search and finds it's not in the possession of the government.

MR. BOITEL: We don't have any record that such a document was given to the government.

THE COURT: He is not talking about a record.

Do you have a record as to what all these documents are?

MR. LITTLEFIELD: Just a general stack of documents.

THE COURT: You don't have a record. That is what he is asking.

MR. LITTLEFIELD: Of any specific document we do not have any record.

MR. BOITEL: Your Honor indicated at the point this problem arose the other day that there ought to be some stipulation as--it did arise in the presence of the jury.

THE COURT: I will ask him to say to the jury regarding this document that they made a diligent search of the government's files and they weren't able to find it. Would you like me to do that?

MR. BOITEL: There is no record that the government had such a document.

THE COURT: They couldn't find a record that they had such a document, I will add that. They could find no record indicating they ever had the document.

MR. LITTLEFIELD: There was no record of any documents that they had, not that they didn't have this one.

THE COURT: You couldn't find any record showing

the government had this document. That's what he wants and he can have that.

MR. BOITEL: Thank you, your Honor.

MR. LITTLEFIELD: I propose to read this stipulation to the jury and to indicate what each of these things are as they come in.

THE COURT: All right. Don't go over all those exhibits too much. You don't need to do that.

MR. LITTLEFIELD: Some of the documents they have not seen before and I will explain to them what the significance is.

THE COURT: All right. Bring the jury in.

(Jury present.)

THE COURT: Ladies and gentlemen, this recess was a little longer than I indicated to you it would be. I just want you to know that all of the lawyers were working together during this recess to bring about some stipulations or agreements between them to shorten the trial, so that I think we will all gain from the work they did and I just want you to know that.

All right, Mr. Littlefield.

MR. LITTLEFIELD: I will state the various stipulations. If anybody wants to clarify or correct it if I have a wrong understanding, I am sure it will be indicated.

First, there is a stipulation between the counsel for the defendants and the defendants and the government that tape recordings of the various meetings between Barres and Bruno, the undercover agent, were made, either on the phone by a tape recording of a phone or by a Kell body transmitting device, and the defense counsel have listened to these tapes, I have listened to them and we agree that if they were played there would be no dispute that they basically substantiated what Bruno and Barres said about these various conversations. So for the purposes of saving time everyone has agreed, there is no dispute about these tapes, we'll not sit here for eight hours and listen to the tapes.

Is that fair, your Honor?

MR. GARBER: Yes, your Honor.

MR. HOITEL: That's solely conversation between Bruno and Barres?

THE COURT: That's correct.

MR. LITTLEFIELD: That's correct. For instance, the meeting in Westchester, the meeting at the Taft, the meeting at the Francesco and the Hotel Taft.

THE COURT: All right.

MR. LITTLEFIELD: Two, a stipulation entered into between the government and the defense counsel that

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the government submitted the plastic bags inside here with the cocaine to the laboratory to determine if any fingerprints could be taken off the plastic bags, and the result of that was that no latent fingerprints of any kind were taken off. In other words, nothing could be read on it. Nothing could be read on the bags of anyone. That is stipulation number two.

Stipulation number three, is that if Mr. Paterna, an attorney in Florida, that if he were called as a witness that he would testify that he went with Mr. Barres and Mr. Lopez to the safe deposit box at the Fidelity National Bank, Box No. 940, on August 21st. In fact, his signature appears here on August 21, 1973, and that they examined the box and that there was nothing in the box of any kind, no money or nothing in the box. He in fact executed a sworn statement to that effect, Mr. Paterna, the attorney. If he were called as a witness that is what he would have said. We all agree on that.

Now, in addition a stipulation has been entered into by the parties with respect to Mr. Barres' statement. Mr. Barres said there had been a slip of paper when he was arrested in his briefcase which had figures on it, which he had done figuring of cocaine, and he had also said there were whole stacks of papers with all sorts of

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figures on it. The government has made an effort to locate that particular paper and it has not been able to locate it. Furthermore, there is no record with respect to any individual papers and there is no record with respect to that paper. There is a great stack of papers with lots of figures on them but there is no record of that paper and that paper the government has not located.

Next, with respect to the telephone--

MR. BOITEL: Excuse me, the government is not claiming it ever had such a paper. Is that correct?

THE COURT: I take it that's right. They haven't been able to find it and they found no record of it. It's not in their possession.

MR. LITTLEFIELD: We don't know if we had it or didn't have it.

THE COURT: All right.

MR. LITTLEFIELD: Then a telephone record which is being stipulated to, that the telephone at the Italian Village Room 111, 4335 N.W.South Tamiami Drive in Miami was registered to Ariel Pomares, the defendant Ariel Pomares. That is a stipulation entered into between counsel for Mr. Pomares and Mr. Pomares and the government.

THE COURT: You so stipulate?

MR. BOITEL: Yes, sir.

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THE COURT: All right.

MR. LITTLEFIELD: Now, your Honor, I will read the formal stipulation with respect to the chemist's analysis and certain other business records.

This is a stipulation which has been signed by all parties, except by me, come to think of it.

It reads: "United States District Court, Southern District of New York, United States of America vs. Antonio Veciana and Ariel Pomares, Stipulation, 74 Cr. 7, defendants."

Mr. Reporter, I will give you a copy of this afterwards so I may read faster than is possible to take it down.

(Counsel reading stipulation with regard to chemist's testimony to the jury.)

MR. LITTLEFIELD: I will offer in evidence all of these items not offered in evidence. As I understand it, numbers 1, which is the voucher; 2, which is the $10,000 check; 3, which is the safe deposit box, are in evidence; 4, which is the lease agreement is not in evidence and the government offers.

THE COURT: The lease application. That will be received.

(Government's Exhibit 4 received in evidence.)

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MR. LITTLEFIELD: 5 is not in evidence but there has been a stipulation with respect to the telephone. 6 is the sample of July 16th, the government offers that in evidence.

THE COURT: All right.

(Government Exhibit 6 received in evidence.)

MR. LITTLEFIELD: 7 are the records of the Hotel Taft from Mr. Barres. They are in evidence already. 8, I believe there is no 8, is that correct?

THE CLERK: It's a train ticket.

MR. LITTLEFIELD: 8 has now become 16. It's the same train ticket. 9 is the suitcase. 9-A is the Polaroid box, 9-B is the J.C. Penny bag, and C through I are the seven packages of cocaine. 10 is the sample from July 23rd in New York. 11 are the three kilos from the stove safe, the thing behind the stove in Miami. 12 are the scales, 12-A is the scale box. 13 is the Americana record for Mr. Pomares.

THE CLERK: Excuse me, counsel, we previously had marked a warrant as 13. You will have to give that another number.

MR. LITTLEFIELD: Can we give the warrant number-- a number at the end.

THE CLERK: That is 17. It's another warrant

I am talking about previously marked 13.

MR. LITTLEFIELD: I don't have a recollection of that. There may be two 13's then. We'll call this 13-A. We'll mark the Americana record as 13-A.

THE COURT: All right.

MR. LITTLEFIELD: 14, which is the Crossway bill for Mr. Pomares; 15, which is the Dupont Plaza bill for Mr. Pomares; 16 is the Amtrak ticket for Mr. Pomares; and the envelopes 10-A; 10-B; 6-A; 6-B.

I believe, your Honor, that is the extent of the various exhibits. The government offers them all in evidence.

THE COURT: In the absence of objection they will be received.

(Government's Exhibits 1, 2, 3, 4, 6, 7, 9, 9-A through 9-I, inclusive, 10, 10-A, 10-B, 11, 12, 13, 13-A, 14, 15, 16 and 17 are received in evidence.)

MR. LITTLEFIELD: May we mark the blackboard, your Honor?

THE COURT: All right. It was written on behalf of Mr. Pomares.

MR. BOITEL: If they want to have it in the jury room, they can have it in the jury room.

THE COURT: But we want some identification.

If you don't offer it I will let the government offer it.

MR. LITTLEFIELD: The government offers it as Government's Exhibit 18.

(Government's Exhibit 18 received in evidence.)

MR. LITTLEFIELD: Upon the receipt of these various items of evidence, the government rests.

THE COURT: You see the lawyers did do something while we were in recess. That helps a lot. The government has now rested. So now it's the turn of the defendants, ladies and gentelmen, and we'll start with the defendant Mr. Veciana.

A N A V E C I A N A , called as a witness on behalf of defendant Veciana, having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. GARBER:

Q I want you to speak loud enough so I can hear you.

Tell us again your full name, please.

A Ana Veciana.

Q And where do you live?

A Miami, Florida.

Q What is your address there?

A 811 N.W. 30th Court.

Q You are the daughter of Antonio Veciana, are you not?

A Yes.

Q What is your age?

A Seventeen.

Q And are you a student?

A Yes.

Q Where do you go to school?

A Immaculada La Salle.

Q Is that a Catholic School in Miami?

A Yes.

Q Do you have brothers and sisters?

A Yes, four.

Q Four brothers and sisters besides yourself?

A Y es.

Q And with whom do you live in Miami?

A With my father, my parents.

Q Mr. Veciana?

A Yes, and with my grandparents.

Q And your mother?

A Yes.

Q And have you always lived with them?

A Yes.

Q Now, Ana, I would ask you to think back, if you

will, to the 21st day of July of this past year, 1973. Do you remember what day of the week that was?

A Yes.

Q What day was it?

A Saturday.

Q And how are you able to remember that day, the 21st of July to any other day that might have occurred?

A Well, my cousin had a party that night. It was a reception party.

Q Reception in honor of what?

A His wedding. He had gotten married fifteen days ago.

Q What was your cousin's name?

A Ernesto Gonzales.

Q So that event is what makes you remember that particular day?

A Yes.

Q On that day did you happen to spend any time with your father, Antonio Veciana?

A Yes.

Q Do you recall what time it was that your day with your father began?

A At eight.

Q Eight in the morning?

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A Yes.

Q What did you do with your dad at that time?

A He dropped us off at my cousin's house.

Q Where was your cousin's house in relation to where you live?

A Well, we live in N.W.7th Street and they live N.W.94th Street.

Q And how long did you remain at your cousin's house that time?

A About two hours.

Q And did your father pick you up thereafter?

A Yes.

Q What kind of car was your father driving at that time?

A A green car.

Q Do you remember what make it was?

A It was a Chevrolet. That's all I know.

Q Was that his automobile?

A No.

Q Whose car was it, if you know?

A It was rented.

Q A rented car?

A Yes.

Q So approximately what time was it then on the

21st of July that your father picked you up from your cousin's?

A Around ten.

Q If you recall, was there anyone else in the car with your father when he picked you up?

A No.

Q All right. Where did you go after your father then picked you up on that date?

A We went to pick up my mother.

Q Pick up your mother?

A Yes.

Q Where was she?

A She was doing her weekly grocery shopping.

Q Did you pick her up then?

A Yes.

Q What did you do after that?

A We drove home.

Q You, your father and mother then drove home?

A Yes, and my sister.

Q Who had been with your mother?

A No, she had been with me.

Q Did you then, after returning home, go with your father again?

A Well, sometime after. We stayed home for about

twenty minutes.

Q Was your father at home during that time?

A Yes.

Q After twenty minutes what happened?

A Well, he told me that--

Q Who told you?

A My father. I had told him that I wanted to go to the airport, to the post office and he told me he could take me.

Q Is there a post office located near the airport in Miami?

A Yes, it's in the airport.

Q Your father offered then to take you?

A Yes, I asked him before and he said he was going to take me. He said he was going to take me then.

Q At that point then did you get in the car and go with your father?

A Yes.

Q Who else, if anyone, was with you then?

A My grandmother and Pepe.

Q Who is Pepe?

A A friend of my father's.

Q An older man?

A Yes.

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THE COURT: What is Pepe's last name?

THE WITNESS: I don't know.

THE COURT: You don't know, all right.

Q So then you left your home, the four of you, with your father driving?

A Yes.

Q Where were you seated in the car?

A In back of him.

Q In back of your father?

A Yes.

Q Who, if anyone, was seated beside him in the front seat?

A Pepe.

Q Where was your grandmother?

A Right beside me.

Q You were going, were you not, to the post office, I believe you said?

A Yes.

Q Before arriving at the post office did there come a time when your father stopped?

A Yes.

Q Do you recall where it was that he stopped?

A He stopped at an apartment building.

Q Do you remember generally where that apartment

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building was located?

A Where?

Q Where.

A It's in 42nd Avenue. There is a rent-a-car on one corner and you turn left and you take this winding road and it's the last building.

Q Do you know the name of the apartment building?

A No.

Q Approximately what time was it, if you remember, that you arrived at the apartment building? Your best estimate.

A It was around 11. Probably past 11.

Q Past 11 in the morning?

A Yes.

Q What was the weather conditions at that time?

A Cloudy.

Q It was cloudy? Was it raining?

A No.

Q It had not rained yet?

A No.

Q And when you came to that apartment what, if anything, did you observe your father do?

A He got out from the car and he walked into the building.

Q So did the three of you then remain in the car after your father left?

A Yes.

Q Did you notice which apartment your father went to?

A No. I just saw him go into the entrance.

Q Into the entrance?

A Yes.

Q Approximately how long was your father in the apartment at that time?

A About 15 or 20 minutes.

Q Did you see, during the period of time your father was in the apartment, anyone else enter or anyone leave from that apartment or from that area?

A There was people coming and going. I couldn't tell you how many, but there was coming and going.

Q When your father left your car to go to the apartment what, if anything, was he carrying that you could observe?

A He wasn't carrying anything.

Q And I think you said he was there approximately 15 minutes. Is that correct?

A Yes, 15 or 20.

Q During the period of time he was in the

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apartment did it in fact start to rain?

A Yes, about two minutes before he left it started to rain real hard.

Q Did you see your father come from the apartment building thereafter?

A Yes, he ran out.

Q He ran out?

A Yes.

Q All right. It was raining when he ran?

A It was really raining hard.

Q Did you see anyone come out before him, immediately before him or a few minutes before him?

A Yes, there was people coming out.

Q You saw people going in as well?

A Yes.

Q What did you do after your father came back from the apartment and went to the car?

A Well, he drove me to the airport, where I mailed the letter and got some stamps.

Q About how long did it take to drive from the apartment to the airport?

A About three minutes.

Q In other words, it's relatively close to the airport. Is that correct?

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A Yes.

Q Now, from the time you and your grandmother and Pepe and your father left the apartment for the airport and arrived at the airport, did your father make any other stops whatsoever?

A No.

Q Where did you go after you left the airport?

A We dropped my grandmother off.

Q Do you recall where he dropped her off at?

A Yes, at her house.

Q Well, where was that in relation to the airport?

A It's about a twenty-minute drive.

Q All right. And that then left three of you remaining in the car, you, your father and Pepe?

A Yes.

Q Where did you go after you dropped your grandmother off?

A We dropped Pepe off in a bus stop.

Q How much longer after you dropped your grandmother off did you drop Pepe off?

A About ten minutes or fifteen.

Q And after dropping him off where did you then go, just you and your father?

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A We went home.

Q Approximately what time was it that you arrived home?

A About one.

Q About 1:00?

A Yes.

Q Did your father remain home with you for a period of time?

A Well, he left around at two.

Q What did he do prior to leaving, before he left your house?

A Well, he showered and he dressed and he ate.

Q Did he tell you at that time where he was going or did you know where he was going?

A Yes, he was going to this convention for accountants. It was a panel.

Q A panel or a convention for accountants?

A Yes.

Q Your father is an accountant?

A Yes.

Q How was he dressed when he left?

A In a suit.

Q Wearing a suit?

A Yes.

Q Did he have a tie on?

A Oh, yes.

Q And when did you next see your father after he left at about 2:00?

A Around six when he came home.

Q Did he have dinner with the family home then?

A Well, we didn't have dinner or anything. He just dropped us off at a party, at my cousin's party.

Q That was the party that you remember on the 21st?

A Yes.

Q You and I have discussed this testimony before, haven't we?

A Yes.

Q What did I tell you before you came in here and testified?

MR. LITTLEFIELD: I object to that, your Honor.

THE COURT: I will let her answer.

What did he tell you?

THE WITNESS: He told me to say the truth.

Q Is that what you have done?

A Yes.

MR. GARBER: Thank you.

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THE COURT: Do you have any questions, Mr. Boitel?

MR. BOITEL: No, sir, I have no questions.

THE COURT: All right, Mr. Littlefield.

MR. LITTLEFIELD: I just have a few questions.

CROSS EXAMINATION

BY MR. LITTLEFIELD:

Q Miss Veciana, what kind of car does your father have?

A Our car?

Q Yes.

A It's a white car.

Q What kind?

A Ford, I think. I am not sure. It's a '67.

MR. LITTLEFIELD: May I just step out and ask somebody to look for something?

THE COURT: Yes.

(Pause.)

MR. LITTLEFIELD: Thank you, your Honor.

Q Miss Veciana, the July 21st date you say you remember because of this party that night. Is that correct?

A Yes.

Q And do you remember the next Saturday, the 28th?

A Not really.

Q Do you know what you did in the morning on Saturday, the 28th?

A I stayed home.

Q Did you stay home all day?

A Yes. We cleaned the house. That's what we do every Saturday.

Q You didn't go out of the house on the 28th, if you remember?

A No, not that I remember.

Q Did you go out in the evening?

A No, I don't think so.

Q And what about August 4th, assuming that is the next Saturday, would you know what you did on that Saturday?

A Yes, I know that Saturday.

Q What was that Saturday?

A We started packing.

Q For what?

A Because that summer in August we went with my uncle and aunt to Washington, D.C. and we started packing that day.

Q What did you do when you woke up that day?

A What do you mean when I woke up?

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Q When you got up, when you began the day, what did you do?

A I had breakfast.

Q Then did you go out?

A No.

Q And what about July 14th, that would have been a Saturday, too, right?

A I must have stayed home, too.

Q Stayed home the whole day?

A I might have gone out.

Q Do you know whether you did or not?

A No, not for sure.

Q Isn't it in fact true that your car is a Dodge Dart, two-door Dodge Dart, 1967?

A Yes, it's a '67.

Q It's a Dodge Dart, is it not?

A I think so.

Q Because you said it was a Ford and I just was confused. But it's a Dodge. Is that right?

A Probably it is. I don't know anything about brands except sometimes when they point it out to me and tell me.

Q Would it refresh your recollection if I showed you the arrest report which says or talks about your

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father's name and then it says make of car, Dodge, two-door 1967, license 1-10845, State of Florida. Does that make you remember it was a Dodge?

A Yes, it could be a Dodge.

THE COURT: It doesn't refresh your recollection, you just don't know, right?

THE WITNESS: It doesn't.

Like my brother tells me, "That's a Corvair or that is a Porsh." That's how I know.

MR. LITTLEFIELD: I don't have any other questions.

REDIRECT EXAMINATION

BY MR. GARBER:

Q You don't know the difference between a Dodge Coronet or a Dodge Dart?

A No.

Q Do you know if in fact your father's car was a Dodge Coronet?

A I don't understand.

Q Do you know if your dad's car was a Dodge Coronet?

A No. I know it's a Dodge now that he told me.

MR. GARBER: Thank you.

THE COURT: Any other questions?

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MR. LITTLEFIELD: The government has none.

THE COURT: Thank you, and you are excused, Miss Veciana.

(Witness excused.)

MR. GARBER: May I have one moment with counsel?

THE COURT: Yes.

(Pause.)

MR. GARBER: If it please the Court, defendant Veciana rests.

THE COURT: All right.

Defendant Pomares?

MR. BOITEL: Rests, your Honor.

THE COURT: All right, ladies and gentlemen, that completes the trial at the trial. I look at that clock and it throws me off. It's now 25 after 3--

MR. LITTLEFIELD: I just wanted to consider whether there would be any rebuttal on the car. Our records reflect it's a Dodge. I don't know if we can stipulate that.

THE COURT: I am sure they can stipulate.

MR. GARBER: I will stipulate it was a Dodge but not a Dodge Dart.

MR. LITTLEFIELD: That is satisfactory.

THE COURT: I didn't mean to preclude you on that.

We'll now adjourn until Monday, ladies and gentlemen. I have a calendar of matters early Monday morning, so I am going to ask you to come in at half past ten instead of 10:00. I guess some of you will be really glad of that particularly if it's still raining but I hope it isn't. So we'll meet again at half past ten Monday morning. The next stages of the trial will be the summations of the lawyers and then my charge and the case will be in your hands.

I remind you again,please don't discuss this case with anyone at all in the meantime. I hope that the rain stops and you all have a lovely weekend. I look forward to seeing you Monday morning at 10:30.

Thank you very much.

(Jury excused.)

THE COURT: Perhaps counsel can come into the robing room in about five minutes to speak about the charge. You can tell your clients they may come in but they may not find it interesting but they are quite welcome to come.

(Recess.)

* * *

(In the robing room.)

THE COURT: First of all I want to ask you

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he sought to make the venture successful, had a stake in it.

Then I will charge Pinkerton on the conspiracy point. I will say if having considered the conspiracy count you find that the defendant you are considering was not a member of the conspiracy or if you find the sale was not made in pursuance of the conspiracy, then you may not find that defendant guilty of aiding and abetting unless the government has proved beyond a reasonable doubt that he participated in the transaction in a meaningful way, knowingly and willfully participated and that knowing of its unlawful purpose sought in some way to make it successful.

After that I will go to knowledge and intent. I will cover knowledge. I will tell them you can't look into people's minds. You have to figure what's in their minds by what they do and that kind of thing. I think in the knowledge and intent also I will make a reference that all this testimony regarding these so-called prior transactions are not here involved at all. I think I will have told them that earlier in the charge. They can only consider that testimony when they come to considering the knowledge and intent of the defendant they are considering.

MR. LITTLEFIELD: I am not quite sure I understood,

your Honor.

THE COURT: All these transactions outside the indictment as to which you put testimony in.

MR. LITTLEFIELD: The first one is the only one.

THE COURT: Two.

MR. LITTLEFIELD: Two was overlapped, I guess, your Honor.

THE COURT: Anyway, all they are bound to do is to determine guilt or innocence under the indictment.

MR. LITTLEFIELD: The conspiracy charge begins the first of November and as I remember of '72. The second of the three transactions is in that period. That they ordered it from Bolivia and it took six months to get here. It got here sometime in March or April of '73.

THE COURT: I sort of remember it was in the summer of '72, that second transaction. The ordering was then.

MR. LITTLEFIELD: Then it came up and Veciana went to New York to get it from the diplomat--the diplomat came to New York and it arrived just after they rented the apartment. There was testimony about the ship through the Panama Canal.

THE COURT: Anyway the indictment reads: "From on or about the first day of November, 1972."

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Perhaps you had better give me that in your charge.

MR. BOITEL: Following through in the previous position I had taken in the case I would request the jury be charged not to consider that evidence at all with regard to the guilt or innocence of the defendants.

THE COURT: Let them consider it under the knowledge and intent of the defendants on this indictment.

MR. BOITEL: You have your exception. Will it be necessary to repeat that exception at the time?

THE COURT: You made it right now. When I get through the charge I will ask you all at the side bar to make your exceptions or any requests, additional requests to charge.

Then I will cover direct and circumstantial evidence. This is a good week to do that. It's been raining every day.

MR. BOITEL: Or snowing.

THE COURT: Yes, that's right. Then I will go on to credibility. That's where I will cover credibility and interested witnesses.

And on co-conspirator, nobody is going to raise a point that a potential witness has not been

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called, are they? 576

MR. GARBER: No, your Honor.

MR. BOITEL: No, your Honor.

THE COURT: All right.

MR. BOITEL: I should say I will make reference to the fact that there has been no production of that document, that missing document. I just want to make sure that I do not mislead you.

MR. LITTLEFIELD: Perhaps I should call the agents. You are going to make reference to that?

MR. BOITEL: Yes.

MR. LITTLEFIELD: Not the failure to call any witness to explain it.

MR. BOITEL: I am going to say there is no document.

THE COURT: That's right, you are going to do this on the credibility of Barres.

MR. BOITEL: Precisely.

THE COURT: Well, I have a stock charge here on co-conspirators. You consider with extreme care the testimony of the witness Barres who admitted that he was a member of the conspiracy. I will have to rephrase this a bit. He was a member of the conspiracy and pled guilty to being a member of the conspiracy. The need is

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UNITED STATES OF AMERICA

vs. 74 CR. 7

ANTONIO VECIANA and ARIEL POMARES

January 14, 1974.

10:30 A.M.

(In the robing room.)

THE COURT: I received from Mr. Boitel, and I take it the government has received a copy of this.

MR. LITTLEFIELD: Yes.

THE COURT: That is denied except as charged. I will think about it and I will cover this point in some way. I am going to mark all of the government's--I have marked them all denied except as charged. I have reviewed them over the weekend. Then at the end of the charge, gentlemen, I will ask you to the side bar and take your exceptions and any requests for additional charges.

Now, there is one other thing: I think I noticed that some of those exhibits, and I think the suitcase is one, has some kind of a rap sheet on the outside of it.

MR. LITTLEFIELD: That is just an envelope.

THE COURT: I want to be darn sure of that. If there are any exhibits in which there are notations of the Narcotics Bureau, I would like them taken off.

MR. LITTLEFIELD: I will take the envelope off.

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THE COURT: I remember I had a sad experience about seven years ago. There was some kind of an exhibit with a rap sheet giving the name and number of the defendant. The defendant didn't object to it and it went in. The Court of Appeals in its wisdom thought the jury might have been prejudiced by seeing the rap sheet and reversed it. I don't want that happening here. So I just want to be sure of that.

MR. LITTLEFIELD: All right, your Honor.

THE COURT: Then at the end of the charge I would like you gentlemen to marshal your exhibits so they will be available and if the jury wants to look at them, they can do so and we will know where they are.

MR. BOITEL: Your Honor, with regard to this proposed charge concerning the admissions of my client, it's my intention to argue along the line of this charge.

THE COURT: You can do that.

MR . BOITEL: I just wanted to be clear.

THE COURT: I wouldn't stop you from doing that. I would like to see what you have to say and I will think about it a little more.

I think I have your times. It will be 20 minutes, 20 minutes, 45 minutes?

MR. LITTLEFIELD: 45 to an hour.

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THE COURT: Well, you try to get it within the 45. I think if these gentlemen only talk 20, 45 will be sufficient for you. I said I will give you whatever you ask for up to an hour.

MR. GARBER: I will try not to exceed the 20. If I do, perhaps it will be five minutes.

MR. LITTLEFIELD: I wondered, I had cited two cases to your law clerk yesterday on the two points you had asked me to get some further research. First the point of whether the jury gets charged that they also have to find enough independent evidence to put him into the conspiracy before they considered the hearsay declarations. And the case on that, there are a whole series of cases, but the Nuccio is the one that says that the Court, once it has found, it does not submit that question again to the jury.

The first question is whether or not the pre-November 1, 1972 acts, what the relevance of them are, and United States versus Costello says any acts that are probative of the existence of the conspiracy come in, as does any other evidence, even though they are before the official beginning of the conspiracy. So they also come in on knowledge and intent but they come in on the existence of the conspiracy. I have sort of a memo on that

here.

MR. BOITEL: The thing that disturbs me, unless my recollection of the evidence is incorrect, is that the only evidence in this case tending to establish those two prior transactions is the testimony of Barres. Is that correct?

MR. LITTLEFIELD: No, there is, for instance, the $10,000 check. There are some other corroborations.

MR. BOITEL: Would that be as to the second transaction?

MR. LITTLEFIELD: First. The second transaction is the one within the conspiracy.

THE COURT: What I am going to charge is something along this line: You will recall there was testimony from Mr. Barres as to prior arrangements between him and the defendant and prior sales of cocaine in Miami through the Midget. These arrangements and sales, if they occur, are not the subject of this indictment. You may consider this evidence only in determining whether you find there was a conspiracy as charged in count one. And when you consider the knowledge and intent of the defendant you are considering with respect to the two counts of the indictment. That's what I am going to say.

MR. LITTLEFIELD: That's fine, but the only

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point, the conspiracy also includes the two transactions.

THE COURT: I covered that on the conspiracy as charged in count one.

MR. BOITEL: Perhaps what was on my mind with regard to this prior transaction, there is certainly no evidence to establish my client's complicity in any prior crimes of Barres. If the jury is going to believe Barres, they are going to believe him as to this transaction. The fact that he testifies about a prior one--

THE COURT: That comes in again on the co-conspirator charge. I will cover the co-conspirator charge. I wouldn't tell them to take it with a grain of salt but I will tell them to consider it with care.

I think we are set, gentlemen, reasonably well, as well as I could do it over a cold weekend.

Are you all set to go, in good voice?

MR. GARBER: Yes, sir.

(In open court, jury present.)

THE COURT: Good morning, ladies and gentlemen. Thank you again for your promptness in being here. As I mentioned to you when we adjourned on Friday, the next stage of the trial are the summations of the lawyers. And this is their opportunity to review the evidence for you.

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Remember, ladies and gentlemen, that what the lawyers say is not evidence nor what I say is evidence. The evidence is what you ladies and gentlemen remember and decide.

Another thing, ladies and gentlemen. Remember that lawyers are advocates. It's not only their right but it's their duty to their client, and they are going to review the evidence with you in the way they think is best calculated in the interest of their client, whether it's one of the defendants or whether it's the government.

Finally, under the practice of the Court, the defendants' lawyers will address you first and they will be followed by the government. The reason for this, which may become clearer to you when you hear my charge, is that the burden of proof here is on the government. The government has the burden of proving the guilt of a defendant beyond a reasonable doubt. And because the government has this burden, the government is accorded the last word before you ladies and gentlemen of the jury.

All right, Mr. Boitel, you may proceed.

MR. BOITEL: May it please the Court, Mr. Garber, Mr. Littlefield, ladies and gentlemen of the jury:

I think on behalf of myself and my client and

I am sure on behalf of the other attorneys and Mr. Veciana, we would like to thank you very much for the careful attention you have paid to this case. Pretty soon it will be your turn to put that attention to work.

Now, you may recall back at the beginning of this trial I referred to the presumption of innocence. Well, I think his Honor, Judge Bonsal, when he charges you as to the law in the case will tell you that even as he sits there now, there is a presumption of innocence which covers my client. And that presumption of innocence remains with him until, after hearing the charge of the Court, you may come to a conclusion that he is guilty beyond a reasonable doubt of the crimes charged in this indictment. It's only unless and until you are convinced beyond a reasonable doubt that that presumption of innocence goes from him.

Now, you are the Judges of the facts. Judge Bonsal is the Judge of the law and he will give you the law but you are the judges of the facts. You are the sole judges of the facts and you are answerable to no one for your verdict, only to your own consciences.

Your recollection of the facts in this case will control. If, during the course of your deliberations, you decide you would like to have some testimony read back,

you may request that the Court have the court reporter read back any part or all of the testimony in the case. You will have an opportunity to examine all of the exhibits in the case. I don't know what you would want to do with that big suitcase over there, but at least some of the other exhibits.

Now, as I analyze this case, there are three categories or three areas of evidence which pertain to my client. The first, of course, is the testimony of Mr. Barres. The second is certain circumstantial evidence in the case. The third is the admissions or the admissions allegedly made by my client to certain of the agents, at least one of the agents who testified and who could understand him in Spanish. That was Agent Pinol. I am going to deal with each of these three areas and I hope you will be able to reason with me as I analyze this evidence.

Now, Barres testified, I think at the outset of the case, at the outset of his testimony, concerning certain prior transactions, transactions which you will not see spelled out anywhere in the indictment. With regard to these transactions the only evidence in this case against my client is the testimony of Mr. Barres.

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Then, of course, he went on to testify about the transaction which is specifically mentioned in the indictment.

At the outset in my opening to this jury I indicated that credibility was going to be an important factor in this case. I asked you to listen as Mr. Barres testified here and to make a determination in your own minds as to whether you would place sufficient confidence in anything this man would say so as to have it weigh or be determinative as to an important decision in your own lives. And if you would not permit something he would say to become determinative of an important decision in your lives, then certainly it wouldn't be fair to have it be determinative of an important decision as to the life of someone else.

Well, let us talk about Barres' credibility. Of course he came here and he testified. He didn't have much choice, did he? He was caught in the act. He had no alternative whatsoever. He was the one that dealt directly with Bruno. He is the one that had the narcotics in his possession. He testified to you during this trial that the reason he went into these narcotics transactions was because he was hard pressed for cash. Well, you heard his testimony as I cross examined him. During the two-year period, I believe from

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1970 to 1972, his net worth went up practically a million dollars. I think it was something like $1,400,000 in 1972. You recall he was a bit of an actor. He admitted being an actor. He admitted during the transactions with Bruno he put on an act. Indeed Bruno came here and testified that the man he had met during those transactions, that is Barres, was a different person than the man he now knows. So we do know that Barres is a good actor.

I guess he also has certain illusions of grandor . At one point during his cross examination he compared himself to President Nixon. At another point in his cross examination he compared himself to J. Paul Getty.

Well, he said he was hard pressed for cash. Do you remember when he was up at the blackboard drawing those statistics, he had difficulty ascertaining what happened to certain cash from certain transactions or he acted as though he didn't really know what was being done with two and a half kilos worth of cocaine and where the money had gone. He didn't have the time to pay attention to it, I suppose. Was this a man hard pressed for cash? It doesn't sound that way to me. Particularly a guy, who, according to his own testimony, was throwing good money after bad because he was never getting a return. Do you

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believe him?

You will recall during cross examination we raised the question of his income taxes with him. I think, and my recollection may be mistaken, but I think when I asked him if he reported the cocaine transactions on his income tax, Mr. Littlefield got up and said something like, "Oh, how would you expect him to report that?" I am sorry Mr. Littlefield did that because there is a purpose to a question such as that. An attempt to get the mask away from the witness, an attempt to have him stop and think about a question that he couldn't anticipate, so the jury can observe him as he is trying to figure out how he is going to answer the question. But you did have that opportunity a few times during his cross examination.

I suggest to you that this man who admits having dealt in these large quantities of cocaine should not be believed by you. He is not worthy of your credibility.

Well, then we have Patrolman Bruno. Bruno can only tell us that Barres is guilty. He has no first-person information, he didn't witness anything himself as far as my client's alleged activity with these narcotics.

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All of that perhaps draws a big picture for you, Bruno's testimony. We had the possibility of tape recordings here, but what would that have added to this case? The answer is zero, because there is no claim at any time during the course of these transactions that Barres inculpated anybody else in this case. So we know Barres is guilty, and that's what Bruno tells us.

Then we get into the area of circumstantial evidence . We have evidence in this case by way of a railroad ticket, by way of a hotel registration to the effect that on the critical weekend my client came to New York and stayed in New York. Well, Barres testified that my client was his right-hand man, used him in all his business ventures.

You know, as you stop to think about the facts of this case you wonder why it was necessary for two people to come to New York. Barres himself could well have taken the stuff on the train if he was afraid of going on the plane, to New York. But he didn't do so. At least according to his testimony he didn't do so. Assuming that he is telling the truth, why did he have someone else bring the cocaine to New York? I think the reason for that is fairly clear. He was looking for a patsy. Assumewith me that my client was the person who

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brought that suitcase to New York. Isn't it possible, realizing that my client was his employee, realizing that my client was involved in his business ventures, that Barres set him up? It's possible.

I would say that based upon the type of person he revealed himself to be on this witness stand, he was certainly capable of doing it.

We have a safe deposit box. Well, what do we know about that box? What does that add to the case? The answer is it adds nothing. No one except Barres testified in this case that that safe deposit box had anything to do with cocaine transactions. We know that my client had a business relationship with the man. We know that both of those gentlemen signed in and out of that safe deposit box. We know that Barres used the safe deposit box for other things. I think at one point he put his wife's or somebody's jewelry in the safe deposit box. So I ask you, what does the safe deposit box add to the case? Only the fact that there was a safe deposit box which at some point, or over a period of time which happens to coincide with the period of time charged in the indictment, that these two gentlemen used that safe deposit box. What was in there? We only know from Barres. If you do not place weight on Barres' testimony,

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the safe deposit box means nothing.

Then we have some evidence concerning a message left at my client's place of business, apparently the place of business he shared with Barres, a message left by Mr. Veciana. What is the message? The message is something to the effect, would you please tell him I have received t he papers he sent me. Well, that takes on a significance again if you believe Barres. If you believe him that the code word was papers, documents, deeds--I mean he kept changing it, but if you believe that, then that takes on significance. But if you are not placing any weight on that man's testimony, then again it doesn't mean anything. Even if you did place weight on that testimony, the fact that two people talk about papers received in the mail, does that necessarily mean anything? The answer is no. I am sure that perhaps sometime during this week one of you has spoken to someone on the telephone and said, "Did you receive what I sent you?" Or perhaps someone has called you and asked perhaps the same thing.

Then we have Lopez and his son-in-law. You recall them. They are the people at a critical point, a Friday or Thursday, whatever day it was that Veciana was supposed to have brought the cocaine to that apartment house, the Italian Village; what was their testimony? Well, the

son-in-law, he came and testified that, "We arrived at the apartment and nobody really said anything to me." Well, you may have noticed, he is a younger guy than the two defendants here, a younger guy than his father-in-law certainly. And sometimes younger people are overlooked. But when the father-in-law took the stand he said, "They said hello to me, I said hello to them, and they took off." Is that inculpatory? If you believe Barres it is. Once you take Barres out of it it means absolutely nothing.

Again, all the strings coming back to Barres. Barres is pulling them. If you believe him, then you find my client guilty. But if you wouldn't place confidence in what he has to say in something of your own lives, then you have a different question.

Now, we come to my client's statement. You hear about statements, you hear about admissions, you hear about confessions. We are really talking about admissions here. What were the circumstances of those alleged admissions? On a Sunday, 11:15. Some people just get up that time on Sunday, some people have been up for some time. We don't know what the circumstances were there, but we do know that suddenly five agents appear out of nowhere. They gain entry and they say, "Mr. Pomares, we have a warrant for your arrest." They then proceed to recite

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his rights to him at some point there. Not once, not twice but three times.

Well, use your common sense. I think that based on your common sense you can reasonably conclude that police officers do not relish advising a suspect that he doesn't have to tell them anything. If they do it, they do it because the law says they have to do it. Why did they do it twice?

MR. LITTLEFIELD: I object to this, your Honor. I think the facts are clear on this and perhaps your Honor will charge on it but I do object to it.

THE COURT: Well, you can go ahead.

MR. BOITEL: I respectfully submit there is absolutely nothing wrong in that.

THE COURT: You may go ahead.

MR. BOITEL: Why did they do it twice? Why did they do it three times? Could they be that concerned about the circumstances? I think you can reasonably find they were concerned. What did they do? They came in. Now, they did not have a right to search this man's house, to go through all his drawers and his rooms and his basement, wherever they went. I assume, and we didn't get a detailed examination, but I assume based on what was said--

THE COURT: Don't assume.

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MR. BOITEL: I think you can assume based on what was said that they conducted a pretty thorough search. They conducted that search pursuant to a piece of paper, which they composed on the spot--I believe the exhibit is in evidence, is it not, Mr. Littlefield?

MR. LITTLEFIELD: Yes, certainly is.

MR. BOITEL: Here is a piece of paper ripped off at the scene from something, I suppose hastily written and signed by my client. Take a look, compare that signature on there to the signatures which are on the safe deposit box and see if it's a shaky signature. I think you can find it's a shaky signature, I mean not quite the same as his usual signature is. He signed it. I don't know what you would do if a bunch of agents came to your home and asked you if you would give them authority to search the whole house. Would you say, "Okay, go ahead"? "You are policemen, you must be good guys, search the house." I don't know. A lot of people wouldn't so readily give that right to anybody. You have a right not to permit people to go through your personal effects.

But he signed it. Now, he was given those rights three times. Interestingly enough, he was also given--can we call them suggestions that he not exercise

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his rights? Maybe a little stronger than suggestions. Your recollection controls and you can have the reporter read it back. My recollection is something like this: "Pal, you are dead. We have got you cold. You had better ccoperate. The best lawyer you have is yourself."

Well, was he his own best lawyer? Could that possibly be the case? So what happens? They get back to the station house, or whatever they call it there. And you heard Mr. Pinol. He said that he translated for Mr. Bruno. Mr. Bruno had a bunch of papers before him.

Now, the testimony is, as I recall it, was that Mr. Bruno was receiving from New York, copies of statements that were being made by Barres. I think it's reasonable for you to assume that the papers that he had in his hand as he is reading from them and looking up, and that was Pinol's testimony, looking up and asking questions of my client, that is exactly what happened here. I think you can so conclude.

You will recall that Pinol said that Bruno was asking leading questions. You know what a leading question is. Did you do this, did you do that, didn't you go here, didn't you go there? Aren't they leading questions?

I guess you can get the point I am driving at.

As far as we are aware, no tape recording made of those alleged admissions by my client, no shorthand reporter sitting there--

MR. LITTLEFIELD: I object, your Honor. This is a subject we discussed in chambers many times.

THE COURT: Don't get into that.

MR. BOITEL: I have no recollection of discussing anything about a shorthand reporter.

THE COURT: Don't get into that.

MR. BOITEL: Am I precluded from discussing that subject, your Honor?

THE COURT: Only discuss what there is evidence on, not what there isn't any on.

MR. BOITEL: Well, I request a bench conference at this point, if I may.

THE COURT: All right.

(At the side bar.)

MR. LITTLEFIELD: Is there any doubt, your Honor, that there are notes of these various meetings?

THE COURT: What is your point?

MR. BOITEL: I was going to talk about two things. Number one, the absence of a tape recording of my client's actual statements and the absence of a stenographic record, a true stenographic record of my client's statements

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We are talking here about notes of notes. Original notes being destroyed and--

THE COURT: I am not going to allow that. You have an exception.

MR. BOITEL: All right, your Honor.

(In open court.)

MR. BOITEL: In any event, what has been presented to you? What's been presented to you are certain oral admissions allegedly made by my client under the circumstances I have described, or more particularly and more truly, as the witnesses have described. The witnesses put on this witness stand by the government, experienced government agents.

So what does this all come down to? I submit that you can find a reasonable doubt in this case as to the question of my client's alleged complicity in the acts charged by the indictment. You can find a reasonable doubt if you disbelieve the testimony of Barres, because he is not worthy of belief. If you understand that this evidence which we call circumstantial evidence takes on meaning only in light of Barres' testimony. Independently it means nothing. It sheds no light on Barres' testimony. It's only Barres' testimony which paints it.

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Lastly, if you conclude that these admissions allegedly made by my client are unreliable, are unreliable because of the circumstances under which they were given, if you reach those conclusions, then certainly you can find a reasonable doubt existing in this case as to whether my client is guilty of the crimes charged.

Thank you very much.

THE COURT: All right, Mr. Garber.

MR. GARBER: May it please the Court, counsel, ladies and gentlemen of the jury:

On behalf of Mr. Veciana, and I am certain on behalf of everyone else that represents the administration of justice in this Court, I extend to you my sincere thanks for the cooperation and for the attention and for the hard diligent effort you have all put in during this last week.

I think that you represent perhaps the finest symbol of the American system of government at work. I recognize also, as does everyone in this Courtroom, that your job is an awesome one. It's a terrible responsibility to sit in judgment of your fellow man. But in taking your oath as members of this jury you have told this Court and you have told the government and you have told these defendants that you will perform that

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job properly, that you will properly weigh all the evidence and that if there should in your minds after hearing the evidence, the instructions of the law by the Court, find there is a reasonable doubt, you will under your oath return a verdict of not guilty.

On the other hand, if you find that there is no reasonable doubt existing under your oath, you are equally obligated to return a verdict of guilty against one or both of these defendants. So I do thank you for it. I don't envy the task that you have ahead of you, because once the Judge gives you this case after his instructions on the law, you then become the judges of the facts. You then arrive at a verdict of either guilty or not guilty.

How did this case really begin? How did it get to you? It got to you by virtue of an indictment being returned by a Grand Jury which sits in the Southern District of New York. And an indictment is based upon a Grand Jury, a number of persons established by law, hearing facts and from those facts, if they feel probable cause, not guilt beond a reasonable doubt, but did someone probably violate the law, then they return what is called an indictment. So in effect what I am telling you is that the Grand Jury which returned this indictment heard those witnesses that the government wanted them to hear. They

did not know anything of Mr. Veciana's background, they did not know anything of what he claims his defenses in this case to be. All they know is the testimony that the government permitted them to hear, was given to them and upon that they found probable cause. Not guilt beyond and to the exclusion of a reasonable doubt but probable cause and they returned this indictment.

And to this indictment my client, Mr. Veciana, has pled not guilty. He has denied his involvement of the charges set forth in this indictment. It's upon the indictment and the plea of not guilty that what we call an issue is formed. And that issue is to be resolved by you members of the jury after you deliberate upon the facts.

I wouldn't attempt to cover all or even many of the facts in this case with you . I wouldn't presume that my knowledge of the facts and my recollection of the facts would be better than yours, because quite honestly, I really have an interest in the outcome of this case because I represent someone accused of a crime in this Court. So I will rely on your objectivity in having heard all the facts and I will rely upon and Mr. Veciana will rely upon your sense of fairness, your sense of justice and the oath that you took t o perform your job as members of this jury.

And we have every reliance in the world that you will properly perform that function.

Now, the indictment, and certainly I think you would be entitled to have it with you in the jury room should you desire it, sets forth the formal charges, as I said. I think I would call your attention to those acts that are set forth in the indictment referred to as overt acts. And specifically I would call your attention to overt act number one, which says, on or about July 21, 1973, Antonio Veciana, my client, Ariel Pomares and Augustin Barres met together at 111 International Hotel, Italian Village, Miami, Florida.

Overt Act number two, "On or about July 21, 1973, Antonio Veciana delivered approximately 10 kilograms of cocaine to Ariel Pomares in a parking lot in Miami, Florida."

So my contention is that if in fact you are to determine that Mr. Veciana is guilty as charged in count one of this indictment, it's necessary for you to find in fact that such a delivery did take place and that Mr. Veciana made such delivery on the 21st day of July, 1973, in the parking lot.

MR. LITTLEFIELD: I object, your Honor.

THE COURT: I think that is not quite the

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law I would charge on this subject.

MR. GARBER: All right, sir.

You have heard evidence of other acts that have occurred outside the periods of time alleged in the conspiracy. I believe that you will be advised that such acts are not to be considered as conclusive of guilt of the conspiracy in this indictment but are merely to be weighed by you for whatever probative value they may have in deterining if in fact a conspiracy existed at all. I think another thing as members of the jury you ought to concern yourselves with would be the interest of witnesses in this case. Very often we hear the phrase that he is a disinterested witness or she is an interested witness. What does that really mean? In the years I have practiced law I really feel, and I suggest to you it's appropriate, that all witnesses in cases are interested. They are interested in having the triers of fact, the members of the jury, believe them. They have taken an oath to testify to the truth and they are interested that you believe what they have testified to. I really don't think there is such a thing as a disinterested witness. So all of them have an interest in the outcome of this case. But what we need concern ourselves with in this case, as in any case where there is a controversy, is the

believability or the credibility of witnesses.

Do you believe a witness that has testified from the witness stand? So keeping the question of credibility in mind, let us just briefly look at some of the testimony or at least some of the witnesses that have been presented in this case, particularly and obviously Mr. Barres. I think of all the witnesses that have testified before you in this case, in terms of being interested, I think Mr. Barres has the most interest in this case. The evidence has shown that Mr. Barres has pleaded guilty to a conspiracy and presently is awaiting sentence. Now, what would his interest be, or at least let's talk in terms of what his hopes may be. Obviously, he is here testifying and cooperating with the government in the presentation of this case in hopes that possibly he might receive probation or certainly a minimal sentence. And in keeping this in mind, this has got to affect your determination of his credibility. He wants to perform as well as possible. He wants to produce as well as possible to aid the government because the government can then come and say that Mr. Barres was of the utmost assistance to us in this case. I think that speaks as to the interest and the credibility of Mr. Barres in this case.

Let us look at the credibility of another

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witness that certainly is most interested in the outcome of this case because her father is on trial. That is the young lady you heard testify Friday afternoon, Ana Veciana. I don't think it's possible to sit in judgment on her truthfulness because I think she appeared and came across to you all as a forthright, truthful, honest, pleasant, bright young lady. And the government, I might add, did nothing in my opinion to disrupt or tear down that presentation that she made, nor did they do anything in the world to affect her credibility before you as members of this jury. So we can compare to some extent those two witnesses with regard to credibility, believability and interest in the case. Both interested witnesses. One inmy opinion coming across extremely credible; the other one having such a great interest in the case as to impair his credibility and your believability of him.

Now, very briefly, some of the facts involved in this case or some of the interesting background in the case. I think the evidence shows through government witnesses that Mr. Veciana was a known Cuban patriot; that Mr. Veciana was a known raiser ofsubstantial funds for the anti-Castro cause; that Mr. Veciana appeared at a meeting in Puerto Rico, and you will recall at that time

the testimony showed that he exibited some $13,000 in cash to members of the anti-Castro movement as money that he had raised. One of the government's witnesses in effect said that wasn't unusual because he did raise large funds for the anti-Castro cause. And the government's witness testified thereafter, and I believe that night, that the vehicle in which Mr. Veciana had these funds was stolen. Interestingly enough it showed that Mr. Barres did not in fact attend that meeting at all.

As to Mr. Barres' background, if you will recall he testified that for approximately two years he was in fact a member of the Castro government; that he held various positions including that of under-secretary of one of the administrative agencies in Cuba. He also testified, I am sure you will recall, of having some psychiatric difficulties in the past. In fact he had been under psychiatric care for a period of time. My recollection is it may have been a year and a half.

Now, the government has made a great issue over the fact that a substantial amount of money apparently had been sent by Mr. Barres to Mr. Veciana, as is evidenced by Government's Exhibit number two, a check. I think each member of this jury will recall that Mr. Veciana and Mr. Barres had been engaged in various business activities.

For example, the promotion of a series of baseball games in South America. I think you will recall also that Mr. Barres admitted that on or about that time the promotion of these games, that Barres had sent the sum of $10,000 in the form of a check to Mr. Veciana. I think you will also recall there was testimony to the effect that both Barres and Veciana were interested in the formation of another business in South America regarding the manufacture of bags.

So it's not unusual that monies passed between people having active interest in businesses to get it. I think the evidence clearly shows the business arrangements existing between Veciana and Barres. So the fact that money did change hands does not mean a thing with regard to the existence of this conspiracy.

Another fact most interesting and I think should be considered by you was that Mr. Bruno, seated here today, testified regarding his transactions with Mr. Barres. Mr. Bruno said that on occasion, or at least one occasion certainly, Mr. Barres had admitted to Bruno that he used cocaine periodically. I think you as members of the community and as intelligent citizens have the right to consider what effect, if any, the use of cocaine might have on one with regard to their reliability and credibility.

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Now, the defendant, Mr. Veciana, did not testify in this case. I as his attorney made that judgment that he would not testify. Now, his Honor will instruct you that this is merely a passing fact, that you are to draw no inferences or presumptions whatsoever from a fact that a defendant does not testify in a case. The reason for that is, as his Honor has earlier stated, there is no burden whatsoever cast upon an accused in a criminal case. He need not prove his innocence. Under our system of justice the entire responsibility rests upon the prosecution in this case to prove and to the exclusion of every reasonable doubt arising from the facts, that an accused is guilty.

Now, during the course of this trial you have seen numerous exhibits offered by the government, including, I believe, 10 kilograms of cocaine. It's very easy, as a member of a jury, I would imagine, to tend to be influenced by seeing such a quantity of narcotics, knowing what the narcotics problem is today in this country. That would be the human, natural thing to do, to be affected by it, but under our system of justice, that is merely evidence that is not in and of itself conclusive of fact. I say to you and each of you, that your verdict in this case should not be affected by the fact that 10 kilograms of

cocaine have been offered in this case. That is merely a piece of evidence. But if you find from the remaining evidence in this case that there should exist a reasonable doubt from the facts that Mr. Veciana is guilty, a reasonable doubt of his guilt, under your oaths you are obligated and must return a verdict of not guilty.

The word verdict means to speak the truth. That is what we know your verdict will do . It will speak the truth from the facts and the evidence that you heard. Again, don't be swayed by the fact that you saw a large quantity of cocaine offered into evidence.

Now, the verdict that you return in this case must be your own verdict. It must, of course, be a collective verdict but each of you form a part of that verdict. Now, if after dispassionately discussing all of the facts among yourselves, after his Honor has charged you as to the law and after fully discussing all of the facts and the evidence in this case, anyone or more of you feel, after that discussion that there exists in your mind from facts a reasonable doubt as to the guilt of the accused in this case, I don't want any of you under our system of law to compromise that verdict, that feeling of your own merely for the sake of reaching a verdict. If you feel that you in your heart, in your

conscience have arrived at a proper independent verdict of your own, have courage enough to maintain that verdict unless you can be shown through proper discussion among yourselves that your verdict in fact is not proper. But don't be afraid to stand up for those things that you believe properly represent the verdict in this case with regard to Mr. Veciana. Because that is what this system of justice is all about.

Further, you are to consider the evidence in this case as against each defendant. You are not to lump it together and merely because you might find a set of facts applicable to one defendant, determine that it must also be applicable to the other. Each defendant is entitled to have you consider his case from the facts and evidence that have been presented and for you to evaluate the evidence as against that individual defendant and arrive at your own verdicts.

I could perhaps spend a great deal more time talking with you about the facts, going through each piece of evidence, but I certainly would not intend to insult your intelligence in this case. You have heard it, you are objective, you are able to arrive at a verdict in this case.

Again, I wish to thank you on behalf of my client. I have every confidence in the world that you

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will properly perform your functions as members of this jury, and I respectfully submit to each and every one of you that after you deliberate in this case with regard to Antonio Veciana, there should and must exist a reasonable doubt in your minds, a reasonable doubt that he in fact was not involved or did not commit those acts alleged against him in this indictment. There must exist a reasonable doubt, based upon the testimony of his daughter, that there in fact did not take place a transfer of narcotics, of cocaine on the 21st day of July , 1973, in the manner that the government said it did . How did the government say it did? Not through the testimony of anyone that saw it take place. Merely through the testimony of the most interested witness in this case, Mr. Barres, that he was told it took place that way.

Again I say to you, our sincere thanks for your attention, my sympathy for the job ahead of you, but again your sincere deliberations in this case and I am confident that result as to Mr. Veciana will be not guilty.

Thank you.

THE COURT: Ladies and gentlemen, we'll take a five-minute recess and then we'll hear the government's summation.

(Recess.)

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(In open court, jury not present.)

MR. LITTLEFIELD: In view of Mr. Garber's mention of probation, I think I should mention that the maximum is fifteen and it's up to your Honor.

THE COURT: I wish he hadn't talked about it.

MR. LITTLEFIELD: Will you handle that in your charge?

THE COURT: I will take care of it in the charge, no reference to punishment.

(In open court, jury present.)

THE COURT: Proceed, Mr. Littlefield.

MR. LITTLEFIELD: Thank you, your Honor.

May it please the Court, Mr. Boitel, Mr. Garber, Madame Forelady, ladies and gentlemen of the jury:

At the outset I want to thank you personally and on behalf of the government for the patience you have shown during this trial, especially because of the snow storms, when I think of some of you coming from fifty miles or more up north and getting on time, it's a great tribute to the jury system. Everyone appreciates enormously that kind of sacrifice.

Your jury service is a very important duty. There is perhaps no higher duty that a citizen can

perform or participate in in our system of justice. That jury system is basic to the system of justice of course, because it serves not only, and defense counsel pointed this out, serves not only as a protection to the defendants who might be wrongly charged but also because it has a second function equally important, and that second function is to protect the community from people who are commiting crimes, equally important, both functions.

Now, in this case there is no need for me to emphasize the importance of the crime we are talking about. We are not talking about milk sugar or powdered milk or canned or anything. We are talking about 10 kilograms, 2.2 pounds per kilogram, 22 pounds of very, very high quality cocaine. So it's clear that I don't have to emphasize the importance of this case.

In fact, you are not to speculate on how much cocaine in the street might be worth, but you know now what it was worth per kilogram at the wholesale level, something like $23,000 was what the cousin was going to pay for it per kilo. Remember, the cousin was talking about diluting it three times. That would mean for each kilo we would have three kilos more. Instead of 10 kilos we have 30 kilos, wholesale at $23,000, which is

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over $600,000 starting at wholesale, let alone what it costs when it gets out into the street. So you can see that we are not talking about pennies. We are talking about something very major.

Now, you heard testimony about two transactions, the first two shipments where the government did not get the cocaine, the government did not seize the cocaine. That cocaine is already out in the street. This time, however, on the third shipment the government did seize the cocaine. The government did get the cocaine. So that has been protected from going out in the street. But now who holds the key to the funnel of cocaine up from Bolivia through this route? Who holds that key but Mr. Veciana? Let's remember that. Let's remember the different roles each of them played in this transaction. Veciana, the man who had the contacts in Bolivia; Pomares and Barres, the men who were going to sell it here. Remember, neither was going to talk about the people they dealt with. Each of them was going to have their separate function. So no one knows but Veciana, only he knows who the sources are in Bolivia. So although we have stopped this shipment of cocaine this time, only Veciana could stop, by giving the government the information, could stop the flow of cocaine up from Bolivia.

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MR. GARBER: Your Honor, I think that is inappropriate. It's inappropriate to refer to any cooperation or lack of cooperation by a defendant.

THE COURT: Fair enough. We'll disregard that.

MR. LITTLEFIELD: With respect to Barres, he has cooperated with what he knew.

Now, you have heard Mr. Boitel and then Mr. Garber explain to you how they would have you view the evidence. They each say the government has not proven its case, and that is their job. It's their job to represent their client and their representation has been as effective as it could be under the circumstances. Now it's the government's turn. It's the government's turn, as I said at the opening, to review the facts, point by point through the case upon which the government contends that beyond a reasonable doubt both of these men have been shown to be guilty of each of the two counts charged.

Remember when I am speaking, as the Judge has already said, what I say to you, as I said in my opening statement also, is not evidence. The evidence is the testimony from the witness stand, the exhibits, and the stipulations, the agreements of evidence, that counsel and defendants entered into with the government.

How do you consider all this evidence? There is

a saying you don't leave your common sense at the doorway. Your common sense comes in with you into the courtroom, goes in with you into the jury room, and it's that common sense, that everyday common sense which the government submits will convince you in this case that the defendants are guilty as charged.

First with that introduction, let us review very briefly the elements of the indictment, as I said at the very beginning of the case, the elements of each count which the government must prove beyond a reasonable doubt. The first count, as I told you, pages 1 and 2, is the conspiracy count. There are three elements to a conspiracy count, and the Court will elaborate on this more specifically but I want to put in focus as I review the facts what the three elements are. First the government must prove that a conspiracy existed to distribute narcotics, in this case, an agreement may not be something signed in a back room to show a conspiracy existed. If that was the rule nobody would ever be found guilty of a conspiracy. Generally what you may look upon to find whether a conspiracy existed is whether people operated in secret, whether they did use codes, as used here, and whether specifically the agreement worked, whether cocaine, which was the object of this

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conspiracy, actually was brought from Bolivia to New York, whether it was distributed in New York. So there is really no doubt in this case with respect to the first element that there was a conspiracy.

The second element is that the government must prove that each of these defendants participated, was a member of the conspiracy, joined it to advance it's purpose. And the best proof in this element again you may find is that the conspiracy worked; that Veciana, according to the evidence, brought the cocaine up from Bolivia and that Pomares worked with Barres to sell it first in Florida and then in New York.

Thirdly, the third element is that the government must prove that one of these six overt acts was committed. Briefly, the purpose of an overt act is that if there is a mere agreement among people to do something illegally, it's not thought to be a crime, it's not by statute a crime, unless someone does something to further the crime. That is the purpose of the overt act. It need not be a crime in itself but it's a step in the direction of committing that crime. There are six overt acts here. They cover the dates July 21st and 23rd, and you will only have to find one of these six covered by any one of the co-conspirators to find the third element.

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The government submits all six has been proven. You only need to find one. The Court will read them to you. You will make your finding on that . Those are the three elements of the count one, the conspiracy count.

Now, the second count, count two is the substantive count, the so-called exact amount of cocaine, the specific crime committed within the conspiracy. That crime is the distribution of seven kilograms of cocaine. There are three elements, again as with count one, three requirements which the government must prove in count two. They, first of all, are that the defendant, whichever defendant you are considering, knowingly possessed with the intent to distribute or to transfer, or actually distributed cocaine. That is the first element.

The second element is that he did it knowingly, he knew what he was doing. It wasn't by mistake. He didn't carry a suitcase which he thought was milk.

The third element is that the substance was in fact cocaine, it was in fact a narcotic drug-controlled substance. In this respect certainly there has been a stipulation as to what a chemist would testify to if he were called, that the seven kilos in the suitcase is cocaine, and I don't think there is any doubt about that.

So the first two elements are the ones you

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must focus on in count two. First, did the defendant knowingly possess or transfer the cocaine? Secondly, did he do it knowingly?

Two additional points with respect to this. The Court will charge you on aiding and abetting, which means that if someone assists someone else to distribute or possess, briefly if he assists him with a stake in having it succeed, then aiding and abetting, you are just as guilty as if you do it yourself. The Court will instruct you on that but that is something you should keep in mind.

In addition, the Court will instruct you, I believe, that if you find the defendants guilty of conspiracy, then the acts, the specific sales that are done--

THE COURT: I will cover that in the charge. I am afraid you are going into too much detail on the charge. I will cover them. Let us not get two versions because I am going to tell the jury they have to accept my view.

MR. LITTLEFIELD: All right, your Honor.

These then are the two counts which the government--which are here in the indictment and with which you are charged with making a decision on in the

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jury room.

What does the case boil down to in it's simplest terms? First of all, defendants say believe Barres on his testimony about everything that happened in New York, about the dealings with Bruno, about the dealings with the cousin, about the dealings with Tony, the sale, negotiations and everything else, believe him on that. And the government would contend that there is very little question but that you believe him also on Pomares, because Pomares, each detail of Barres' statement about Pomares is corroborated by the lease, the hotel reservations, the trip to New York on Amtrak, the Crossway. Each of these details are corroborated. Believe him, in other words, on Barres, on Bruno, and Pomares, but don't believe him on Veciana. That's what it boils down to.

What sense does that make? Why would Mr. Barres incriminate his own right-hand man? Why in fact when he is telling the truth would he incriminate his own right-hand man and also incriminate someone who is not his right-hand man? It doesn't make any sense. If he does it with Pomares, he has gone as far as he can with people close to him. If anyone, he has a reason to protect Pomares. Once his testimony, which is corroborated point for point about Pomares is in and

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believed, then it's even easier to believe the testimony against Veciana. It makes no sense to go against one and not the other.

When I say it boils down to that basic or round-about picture, the other thing it boils down to is that the only corroboration you have seen in this case has substantiated what Barres said. That corroboration was in documents. He didn't know what documents were going to be found by the government when he made his statement. So he was taking a risk if he was making it up. In fact at each point there could have been a document, there it is.

Then we had the people witnesses, the Nunezes, the Figueroas, the Carpios. Each of them corroborated animportant detail of Barres' testimony. Wherever there was a person who could be brought in to corroborate, in short, he was there corroborating. Barres didn't know they were going to be available. Wherever these men's conspiracy ran into someone else, that person was here, if he was an innocent person. We didn't get the diplomat, we didn't get those people yet.

Let's go over these other corroborating witnesses. I will do it in more detail at the end but I will point it out to you. The first one was Nunez. Nunez was the Cuban who escaped from Cuba on the Liberty Flight

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and he was the man who was an active anti-Castro person in Puerto Rico. He was the man who said, sure enough, $13,000. He remembered that figure. Veciana had thrown on the table an envelope with $13,000 in it and it was stolen that night in a rented car. Now, that is exactly what Barres had said. Mr. Garber makes something of the fact that Barres wasn't at this meeting. Well, that favors the government because what that point shows is that he didn't know about the $13,000 from the meeting. The only way he could have known about the $13,000 was if in fact he had given to Veciana under the circumstances that he said. So that cuts our way, not their way. That's Nunez.

The next one chronologically was Carpio. Carpio is the man who used to work for Freca and who worked early Saturday morning and answered the phone and got the phone call. The message said, "Tell Pomares I have received the documents." Now you heard the code. You heard Bruno testify about the code, that Barres had used a code dealing with him, that Barres had said, however, "Copy of contract." In other words, the code was either the deed, the contract, the document. That means the cocaine has arrived. If you talk about six acres, that means six kilos. When you talk about the document arriving

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that means you have the cocaine. So Carpio, who is an independent witness, comes in and puts the lie right on Mr. Veciana. There it is. Mr. Veciana calling up and saying--the first two weeks of July, just before Barres was arrested. You remember Carpio said he remembers the time because it was just before Barres had his trouble. This is when Barres told you that Veciana had told him the stuff had arrived. Veciana calls Pomares and says, "Tell Pomares I have received the documents."

Mr. Boitel changes that statement a little bit and says, "Tell Mr. Pomares I received the documents that you sent me in the mail." That's not what Carpio said. He was very clear on that, Carpio. "Tell him I received the documents."

You might remember Mr. Nunez' testimony, that he knew both Pomares and Veciana, and they had no business relations together, no business dealings together. So that I think it's clear from this, "I have received the documents." Then what did Carpio do? Carpio called Pomares, and Pomares, as I remember his response to Carpio giving him the message, was, "All right, thank you." He didn't say,"What documents,"or he didn't say, "I don't understand the message," because he knew that code was clear. That's Carpio, the second of the

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corroborating witnesses.

Then the third, Mr. Figueroa, and the fourth, Mr. Lopez, and there are two points here with Lopez and Figueroa, or even three. First there is no question that the visit was made, according to their testimony. There is no question that the three men were meeting together in that room, in the Italian Village, Veciana, Pomares and Barres, as Barres said just at the time they were discussing as to how they were going to organize this last sale of cocaine. No doubt that visit took place.

Lopez and Figueroa, Figueroa was really unclear as to whether there had been a brief greeting when they had arrived at the meeting. He was unclear as to whether someone had said hello. He couldn't remember. I think you can look at that as showing how the government calls witnesses. It doesn't prompt them, it didn't organize with them the kind of testimony. It puts them on the stand and they give you their best recollection.

Two people who do attend a situation like that, it was nothing noteworthy at that point to them, would not remember exactly the same. They wouldn't remember whether someone said hello or not . That shows you how truthful testimony comes out.

The second point about that is that both Lopez

and Figueroa, Figueroa especially, did sense something odd was going on here, something very odd. You may find from that that the sensing corroborates Barres.

Thirdly, Figueroa's extraordinary testimony--Mr. Lopez, excuse me, the father-in-law, his extraordinary testimony to the fact that Mr. Veciana had visited him, Mr. Lopez, four or five days before the trial, had gone and said, "Will you come to New York to testify that we left separately, that Pomares and I left a few minutes apart?" Now, if there were any confession of guilt it's going to a witness and trying to get him to testify that people left separately, when in fact they left together. Then, of course, Mr. Veciana said, "But, tell the truth, tell the truth." Mr. Veciana is no dummy. He is not going to tell him to lie. If he could get Mr. Lopez to say they left separately, that would put the lie to Barres because Barres said they left together, because they were going off to switch the cocaine. So you can see Mr. Veciana practically standing up and admitting by going to a witness and trying to get that witness just a few days before trial to testify that they left separately, when in fact Lopez, Figueroa and Barres say they left together.

Now, it also comes down with respect to Barres'

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testimony, I think really the most telling detail is that Mr. Barres told the government about the three kilograms in Florida. He told the government about the fact he had been involved in two previous shipments of five kilos and nine and a half or ten kilos. The government didn't know anything about that. He, Mr. Barres, got on the stand and he also told the government, as Mr. Bruno said right after he had been arrested, he told them about the three kilos in that apartment down in Florida. If you were trying to cover up or make up a story, you certainly aren't going to incriminate yourself to the tune of three more kilograms of cocaine. You are certainly not going to turn over the scales. You are certainly not going to say, "Yes, sure enough, I did five other kilos the year before and I did ten other kilos six months before." That would be absolutely insane.

So you may find that by his candor, by the fact that he admitted--they didn't know anything about the safe but he told them about the other three kilos--that he was telling the truth.

You may also find by analyzing Mr. Barres' testimony, and I will go over this again, in fact despite long cross examination there was never a shaking on the facts. He never contradicted himself. There are really

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three purposes to cross examination. One is to show there are inconsistencies with regard to one person's own testimony. In other words, you get him to contradict himself. Another purpose is you get him to contradict somebody else. Another purpose you show that he is such a lousey guy he couldn't be believed anyways. I don't think any of those functions were shown by the cross examination of Mr. Barres.

Certainly there was no inconsistency in his own testimony. They weren't able to shake him on that. In addition they weren't able to shake him on any other details with regard to any other testimony. In fact it all supports him.

Thirdly, showing that he is a man whom you couldn't possibly believe. Let's talk about how he felt, as he said from the witness stand, about giving his testimony here. It was like a confession. He felt better because he was spilling out his guts. That seems very real, I think you may find, a very real reaction. Getting out of his system the bad thing he had done.

With respect to Mr. Boitel and Mr. Garber, they suggest you can't believe him. They suggest the government is asking you to bring Barres home for supper.

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The government doesn't pick Barres as a witness. The government would like to call people who had never been involved in cocaine deals to testify about cocaine deals. But you can't get them. Mr. Carpio doesn't know anything about the cocaine deal so he can't come in and say that Veciana and Pomares sell cocaine. Only the people on the inside can testify about that because they are the only ones who know. I told you in the beginning this was the best possible evidence, someone on the inside, somebody who knew from his own eyes what happened.

I think that the three days of Mr. Barres on the stand bears that out.

Finally, Mr. Garber said he is an interested witness. Of course he is. But you will note that it will be Judge Bonsal who will sentence this man. In fact, there he was sitting there forthree days. Do you think he would sit there beside Judge Bonsal and make up a story? So the fact that these gentlemen say that he is lying or he is not telling the truth to save himself; in fact, isn't that a better motive to tell the truth? Isn't it a better motive to tell the truth?

Now, I want to go through some of the arguments Mr. Boitel and Mr. Garber made during the course of their summations and in the course of their cross examinations.

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I think they fall into the general category of what we call smoke screens. Mr. Garber made a big thing how he is not going to talk about the facts, he didn't want to insult your intelligence. I don't blame him for not wanting to talk about the facts. Because when he talks about the facts they all point to Veciana.

It's a smoke screen. It's like you puff up smoke to distract from what is going on.

For instance, Mr. Boitel says that the first two transactions that are described are not spelled out in the indictment. Well, of course they are not spelled out in the indictment. We don't have the cocaine.

Secondly, he says that Barres is a big shot. He compares himself to President Nixon and J. Paul Getty. Well, under cross examination, as I remember, the Nixon reference was that many people have tax audits and the J. Paul Getty was a reference to the fact that one's liquid, one's paper worth varies enormously. An accountant could say you are worth X amount of money but you couldn't sell it because that would be the appraised value of your stock. But you couldn't sell it for that much necessarily.

Then Mr. Boitel argues that perhaps Barres set Pomares up, the whole thing was a set-up for Pomares. You will see each of the men had their different roles.

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Mr. Boitel argues why didn't Barres bring the cocaine to New York? Well, it's very clear, each of them had their different roles. Veciana was the man who brought the stuff up from Bolivia. Pomares was the man who had the contact to sell the stuff and Barres was one of the organizers with Pomares. He knew both Veciana and Pomares. So each of them had their roles. At the end it turned out that Barres was the one who was going to make the sale in New York and the roles had shifted slightly. Remember, Pomares didn't put up any money for the investment. Surely if Barres were trying to bring Pomares into this case untruthfully he would have said Pomares invested ten dollars, and blah, blah, blah. He didn't. He said Pomares invested nothing. What was Pomares going to do for this third transaction after he had worked with Barres to put the stuff in the bags? He was going to carry it up to New York. You remember Barres said he had to meet Tony that Saturday night, so he had to get to New York quick; whereas Pomares came up on the train to bring the cocaine up. That is absolutely documented right here, exactly the way Barres said. He said he bought the ticket some ten days before, on July 14th, because that's when they thought it was going to arrive. It didn't arrive until later so Pomares didn't come up on the 22nd, and

that's what this Amtrak record shows, the 22nd.

Now, the safe deposit box. Mr. Boitel says it has no proof it has anything to do with cocaine. What the safe deposit box does, it corroborates Mr. Barres. It's a document. The most significant of all, as we have here on July 24, 1973, the day after the arrest, the day Pomares goes back to Florida, an entry, "Pomares, July 24, 1973 The exact day after the arrest. Obviously why is he going back there? He knows the jig is up and he is getting the money out . You may look at this and take it to the jury room with you.

With respect to the confession which Agent Pinol testified Pomares had given after he had been arrested in Puerto Rico, Mr. Boitel says it was leading questions, leading questions. He couldn't have said that. Let's look exactly at what Pinol testified the confession was. Pinol didn't testify that the confession corroborated Barres in every detail because Pinol said that Pomares had said the cocaine--"I didn't know it was cocaine until I opened up the suitcase in the apartment." Now, that is entirely logical. He may have well confessed that way. He might have wanted to hide his prior involvement. Pomares' confession was limited in that sense. Pinol talked about the pecan pie,Pomares said they talked. "I don't remember Barres saying about a pecan pie. But about food." If A 708

Pomares knew it was a pecan pie then it must have happened like he said.

With respect to Mr. Garber, the plain thrust of his summation on behalf of his defendant, seems to me he wouldn't insult your intelligence by discussing the facts. I pointed out to you he couldn't because they point overwhelmingly to the guilt of Veciana. He suggests that Barres was a member of the Castro government. But you remember that both Barres and Nunez testified that at the time that Barres was the Assistant Secretary of Health, at that point Castro was not yet a declared Communist. It was when he became a declared Communist that Barres got out of Cuba, just the way these other people did. You heard Lopez, how he got out, I think it was a boat, and how others came out on flights. Others had come out on different ways. There was some suggestion on cross examination, how could you get out on a Pan American flight? But Nunez said that before the Bay of Pigs, which was the attempt to overthrow Castro, it was much easier to get out. You remember Barres said he left on January 8, 1961, exactly 13 years to the day before he testified in here. That was some three or four months before the April Bay of Pigs, when it was made much tougher to get out. That is when Nunez said he had to come

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out on a boat. I don't know what kind of a boat but it was a boat.

Now, with respect to Mr. Garber's other argument about his raising money for Cuba, I think you will find that no patriot, no person really interested in freeing Cuba from Castro would ever want that freedom to be based on money earned from selling cocaine into America, from the misery cocaine brings, no one wants to build a free Cuba on selling cocaine. None of these other patriots, Nunez, Carpio, want their movement funded by cocaine sales in New York.

Mr. Garber talked about that he saw a psychiatrist and how can you believe him? Let's remember exactly what the facts are. For nine months in 1970 Barres said he saw a psychiatrist. That was the time that his wife of 13 years was leaving him and he was getting a divorce. He saw a psychiatrist then. He said he had seen a psyschiatrist twice more after he was arrested in this case because he was so depressed. He felt inside so rotten and he felt depressed. Then he had two more psychiatrist's visits. Surely, if anything, those are very human kinds of reactions to the events that befell him in '70 or '73.

Then he says, Mr.Boitel says, that he had all

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that money, why did he possibly need to go into cocaine? The point is that the money, as he said, was not liquid. He perhaps could have sold some of it, but he wasn't able to at that time. He had loans he had to pay back. Besides, this was a golden opportunity, they thought, for vast cash earnings. On this last sale look at how much they were going to make. If this last sale had gone through, if this man, the cousin, had been a real buyer of cocaine, let's see, seven kilos times $23,000 is about $164,000 , $163,000. So that it's entirely normal. The original 10,000 investment gets pushed back into the second transaction and now about the third transaction, $160,000 in cash. If they kept going, just imagine the amounts.

Then the height of absurdity, this question about whether he pays income tax on his cocaine earnings. Can you see declaring on your W-2, cocaine, earned $22,500 and sending it into the IRS in Andover, Massachusettes or wherever it gets sent? Impossible.

Then the other main defense of Mr. Veciana is the testimony of the daughter, and let me just make a few points about that. First of all, you may ask yourselves how many of you can remember exactly the details, hour by hour, of any day back in July. Sure, if it's a day you are selling cocaine on you may remember it. But if

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it's a day that all you do is have a party that evening, you can't remember detail by detail. In fact, she couldn't remember what she did the Saturday before. She thought they were home cleaning. Or the Saturday before that or the Saturday after it. She remembered two Saturdays later because she was going to make a trip and they packed. On this Saturday she can remember at eight she went here, 8:30 she went here, 9:00 they did this and 10:15 they went here and they went here. Then all of a sudden we go to the airport to get a stamp and a letter. I don't know why you need to go to the airport to get a stamp or letter butthat's what the testimony is.

Even assuming that you believe it, it doesn't in any way really dispute the guilt of Mr. Veciana. All it comes down to on her part is that she says that people came in and out--that her father went into this apartment at the Italian Village and there were people coming in and out and that he then came out and they drove off. Now, she says he came out and got into the car and they drove off, that was it. But we know from the other witnesses that two people, that Pomares and Veciana came out together. We know that already from the other two witnesses. We know on that point she is just the slightest bit mistaken. All it takes beyond that is for Pomares and Veciana to have

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gone to the trunk, take out the two bags and put them into Pomares' car. So her testimony is entirely consistent with everything else, except on that one little point, did they or didn't they go to the trunk. The government submits how would she remember these details all the way through on an entirely ordinary day. And secondly the fact that she said people came and went but he came out alone. Well, we knew he came out with Pomares. It doesn't take much more to say he came out with Pomares and went to the trunk. That's all that is.

Now, let's go over the testimony, as I said, a conspiracy case, putting a conspiracy case is like a woman who is cleaning a house might pick up a rug in a house, for instance, you would go to one corner, pick it up and put it in the middle, go to another corner, lift it up and put in the middle, the other corner and the same with the other two corners. You might put laundry in a sheet thatway, you put all the corners in the middle and lift it up like that. That is the way a conspiracy case comes in from the witness stand. One piece, another piece, Nunez, Barres, and all the pieces come in and at the end they all fit together.

Barres, was, as you know, born in Cuba and left in 1961. He worked in construction companies; set up Freca Importers; worked as a mortgage broker, in

real estate; he was a wheeler-dealer in finance and took out loans, he did very well. He knew Pomares. He took him in and Pomares became the Treasurer of Freca in 1970. By 1971 Pomares was not doing as much any more for Freca as he had been doing because he had this Occidental business. Barres also knew Veciana in connection with the politics of free Cuba and also in connection with the boxing and the baseball effort. At one point after the baseball effort had been a flop and after their boxer, Rondon, had been knocked out by Foster in the first round, they lost all hope of having Rondon be a heavy-weight champion and getting rich. Veciana said there was a discussion between Barres and Veciana. Again Barres said he couldn't remember who brought it up first. Obviously if Barres was trying to make up the best story about Veciana, he would say, "Veciana came to me and said we would do this and this," that's not what Barres said. He couldn't remember who first brought it up. In any event, Veciana who worked in Bolivia and went in through Venezuela, he said he could put a kilo of cocaine on Barres' desk. Barres then went and talked to Pomares and asked him where they could sell cocaine. Again if Barres were making up the story against Pomares, he would have said, "Pomares came to me and this and that." Instead he said, "I asked Pomares whether he knew

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of a place where they could get rid of cocaine." Pomares said he thought he had this person who could be sort of a middle man. Veciana came back from Bolivia and told Barres he made contacts in Brazil, Interpol, the diplomat and they could bring it to Miami. At that time they discussed the code, acres and documents and contracts. Thebuying price of the first five kilos was going to be $4,000 a kilo, $1,000 for the Interpol man, $1,000 for the diplomat, $2,000 to the factory. Five times four is 20,000. Antonio's signature is on the back of this document, a check payable to Veciana from Barres. Barres went to the bank and got a check to Veciana for the amount of $10,000, exactly half of the initial investment. The date on that check is June 20, 1972. Well, Mr. Garber says it's all pertaining to the baseball. We know that the baseball was over in March. That was spring training.

Then what is next? So the cocaine is ordered in June and it arrives in late August or early September. The diplomat arrives in Miami. Veciana picks up the five kilograms. Remember this time it's in that plastic cooler, beach cooler. He takes it to the Crossway Inn where he gives it to Pomares and Barres. Pomares buys a stamp scale and they put it into the five kilo bags themselves.

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Eventually it's sold through the Midget, $60,000 total selling price, five times 12,000. The profit is divided up, although it's eventually turned back into the next investment as far as Barres and Veciana are concerned.

Veciana when he comes back says the price is up to $4,500 a kilo in Bolivia. Secondly, that the diplomat is leaving to go to Spain but he will put him in touch with a new diplomat. Veciana goes back and orders a new shipment. He orders it in October and you will look at the dates on the entry to the safe deposit box, you will see Pomares going there October 5th, October 13th. He gets the money. Veciana then gets the money, goes back down to Bolivia and orders 10 or 12 kilos. Again Barres isn't sure whether it was 12 or 10. In any event, nine and a half kilos arrive. The ship goes to the canal and it's delayed. And if you are making up up a story, you don't make up stories like this. Eventually it arrives and it arrives a little after April. How do we know that? Because just before it arrives Pomares and Barres decide they don't want to keep the cocaine in the Crossway Inn in a rented room, so they rent, in Pomares' name, they rent an apartment. This is 111 International Airport Village. They rent an apartment and what happens? That is where they are going

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to do the mixing, that is where they are going to keep the cocaine.

So around April, and this is on April 3rd, Barres said the cocaine arrived a little after that. Then the cocaine arrives and in fact Veciana tells Barres he is in touch with the diplomat and the kilos are going to be delivered to Miami. They are delivered and this time how does the transfer take place? Barres arrives at the Crossway, he calls up Veciana and he comes over in his own car, the Dodge, which it was stipulated to it was a Dodge and Mr. Barres said it was a Dodge. They go back to Veciana's house, pick up the cocaine in the two shopping bags, they bring it back to the Crossway and at the Crossway it's then brought over to the Pomares apartment where it's put into the bags. This is the details of this nine and a half kilos. It was not ten kilos which they anticipated. Again, that is sold according to that schedule on the blackboard. Nine and a half kilos. The selling man, the distributor doesn't do very well this time. In fact they don't ever get paid for one and a half kilos. The Midget apparently gets drunk. The person to whom he sells it to goes off for some reason. They have trouble. They don't know who to sell it to. With respect to the third shipment they have to figure out a new way.

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Here's where the government comes into the picture. Barres comes up to New York, he meets with the person who is a Mafia man. Tony then introduces him to Bruno, who is known as the cousin. Bruno is an undercover agent.

On June 29th, Bruno and Barres meet, they discuss the price at $123,000 a kilo. They discuss five kilos now and five on consignment. They talk about the code again. Bruno corroborates right down the line what Barres said about those conversations. Bruno drives Barres to the airport. They agree in the middle of July at the Hotel Taft there will be a sample delivered. Sure enough, Barres goes back to Florida and finds out--meets Veciana and Veciana says there has been a delay, there has been a slight delay, this new diplomat had to go to Chile in connection with taking over another diplomat's work. So Barres knows it wouldn't be on July 16th. Showing Barres thought it was going to be July 16th, we have this ticket bought for Mr.Pomares. Barres now learns there is goingto be a delay. He comes to New York, meets Bruno in the Hotel Taft. He gives him the sample of cocaine which he keeps in the Q-Tip box. That's on July 16th. They go out to dinner at Francesco's Restaurant. They agree that the deal will take place about four, five, six days later. Back to Miami he goes, Barres. Veciana

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tells him it has already arrived. That is corroborated by Carpio, who says in the first two weeks of July at some point Veciana calls Pomares and says, "I have received the documents, " which means,"I have the cocaine."

Then Barres calls Pomares in SanJuan to see how soon he can get there so he can get organized for the sale. Pomares says he can arrive late Friday night or early Saturday morning. He arrives early Saturday morning. Barres says he goes to the Crossway and hears the reservation, July 21st. He was at the Crossway then. It's that Saturday morning that the three of them meet at the Italian Village. The three of them meet together. This is the meeting where they discuss how the cocaine came in. You remember Barres described these long plastic tubes that are sewn together. That 's what Veciana said as to how the cocaine came in through a diplomat. They discuss different ways of testing it, sticking a thermometer, which you may think is ridiculous. What is it supposed to do? That's a way of testing it. In fact, these dealers are sort of like the gang that couldn't shoot straight: They didn't work too effectively, too perfectly. In any event, while they are discussing it at that moment, up drive Lopez and Figueroa, another sort of gang that couldn't shoot straight problem. People poppin

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at the critical moment. There is no doubt Pomares and Veciana leave together. Veciana coming to Figueroa and saying, "Testify that we left a few minutes apart," if that isn't an admission of guilt, I don't know what is.

Veciana gives him the cocaine in the parking lot. Pomares calls up Barres after the two had left. He comes over to Barres and they get out the scale--they have to go first and buy the bags. They go out and buy the bags and thermometer. Pomares in his confession said they bought a pecan pie. They also bought masking tape. They pour the cocaine into this scale, and you have seen the bags of cocaine in the suitcase.

THE COURT: They have seen them. You don't have to do that.

MR. LITTLEFIELD: I am not going to take them out, your Honor.

You have seen the bags. You also saw the J.C. Penny bag, you remember Barres said Pomares had to buy a suitcase. You will have a chance to examine that J.C. Penny bag. You may find in fact that J.C. Penny bag is probably the bag in which the suitcase was carried.

They already made their arrangements as to what they are going to do in New York after they get the stuff in the suitcase. Seven kilos is put into this suitcase

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to be carried out by Pomares, who is going to take the train Sunday morning and Barres is going to fly up and make arrangements to meet with the cousin.

At that point Pomares takes the Amtrak train. You have that record. Pomares then checks in at the Americana, July 23rd, he takes the train up on the morning of the 22nd. The train takes overnight. The 23rd he checks in the Americana, exactly as Barres said. Barres didn't know we were going to have this record. Then the 23rd, on the 23rd, which is the day that Pomares arrives in New York, they meet at the Americana. Barres gives him the keys to the hotel room. Pomares takes the cocaine over to the hotel room at the Hotel Taft. He has two rooms, one where Pomares drops off the cocaine, the other room where Barres is meeting with Bruno. They meet, the cocaine gets put into the room at the Hotel Taft, Bruno and Barres meet and have their discussions. Bruno has taken out the money and he has it if he needs to show it to Barres. Bruno tests it, pretends to test the cocaine and spits it out in the pail. At that moment, just when Bruno has that signal which he is going to give by the Kell body transmitter, that he is satisfied, bang, in come the other agents to make the arrest. Of course at that point Bruno is still pretending he is not

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an undercover man. Barres gets taken off, back down to the police station.

First he even tries to cover up Bruno because he's afraid of Bruno being in the Mafia, a murderer. Bruno then comes in and says he is an undercover policeman. You heard the reactions, that Barres is relieved because he is not a murderer and he called him a son of a bitch.

It's at that point that Barres just opens up. Barres tells about the three kilos, tells about Veciana, tells about Pomares, tells about everything that happened. He tells about the other two shipments. I reiterate, why in the world would he tell about these other three kilos? Why would he incriminate himself about the other five kilos and the other nine and a half kilos if it weren't the truth right down the line?

So the defendants are in an impossible situation. They would say believe him on the seven kilos, believe him on the three kilos, believe him on the scales, believe him on Bruno, believe him on that, but don't believe him on this. It doesn't make any sense.

Then we have Carpio, who is the witness who testified about the telephone call. We have Nunez, who is the witness who testified about the $13,000 in the car. I want to remind you again, that if Barres wasn't at this

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meeting how would he have known about the $13,000 unless it was true?

We have Mr. Lopez and Figueroa and again Veciana goes to Figueroa and saying to testify that we left separately. Then we have Bruno, who testified, and you remember Bruno's testimony which, essentially, confirmed each of the details Barres had said about the negotiations.

So where do we get? I want to close by giving you an example of the way evidence works, and I want to tell you a little story about how evidence works.

THE COURT: Your time is almost up.

MR. LITTLEFIELD: I will be done in about a minute, your Honor.

Say you have a son, Johnny we'll call him, and you are in the living room and you can't see in the kitchen. Johnny has a playmate Billy. You tell Johnny that the jam is on the shelf, but stay away from the jam, don't touch the jam. You know you can't have any jam, it's not suppertime yet. So you are sitting there watching television and Johnny and Billy go into the kitchen. After they have been in there for a minute or so you hear a crash and a tumble and a broken glass you go running in and there is Johnny picking himself off the floor, the

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stepladder has fallen down by the counter, the jar of jam has broken on the counter, fallen off the shelf, and Johnny has jam all over his face. Billy is saying that Johnny did it.

That is sort of what we have in this case. We have all the corroboration. We have all these documents which corroborate. You don't know and you weren't in that kitchen, but you know for sure that Johnny and Billy went at that jam. So what we have in this situation is the same thing. Mr. Veciana, he has jam all over his face just the way Johnny did.

So the best way for me to close is as I began, and that is to remind you of your oath and responsibility. In the last analysis the decision is up to you. You have a very serious obligation of course. The government submits on this evidence there is an overwhelming case of guilt. Your oaths are to well and truly try this case according to the evidence and the law as the Judge shall give it to you. Nothing more is required of you than abiding by this oath. No sympathy, nothing may get in the way of your abiding by your oath, which is the facts, the evidence which is in this case. That is what your oath is.

That oath, the government submits, requires a finding that these defendants are guilty as charged.

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First of conspiracy to sell narcotics; secondly, of playing their different roles of being the people who sold, together with Barres, seven kilos of cocaine.

Thank you very much.

THE COURT: Ladies and gentlemen, we'll take another five-minute recess and then I will deliver my charge.

(Recess.)

* * *

MR. BOITEL: Your Honor, I would respectfully like to move for a mistrial based upon the ground that the prosecutor in his summation repeatedly made himself an unsworn witness in this case. He continuously, unless my recollection of the evidence is really faulty, he continually referred to what Barres said upon his arrest. And then he further testified to this jury that evidence secured by the government after those statements corroborated Barres' statements.

Now, my recollection is, and I am sorry I don't have a copy of the minutes, but my recollection is there was no such testimony in this case and the prosecutor did make himself an unsworn witness and deprived the defendant of his 6th Amendment right to cross examination.

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THE COURT: I am going to deny your motion. I think what he had reference to, Barres indicated the other three kilos down in Miami behind the stove, and the scales and they went down and found them. I think that is what he was doing.

MR. BOITEL: My recollection is there was a warrant involved. From listening to his summation I think he did that with regard to practically every fact of the case.

MR. GARBER: For the purposes of the record I will join in that motion.

THE COURT: I will deny the motions. You have an exception.

(In open court, jury not present.)

MR. BOITEL: May I be heard again?

THE COURT: What is it?

MR. BOITEL: It has to do with your charge. In the prosecutor's summation there was a great deal of reliance placed upon the question of whether two men left the apartment at the same time or left at different times. Now, my recollection of Mr. Lopez' testimony--

THE COURT: I am not going to comment on that. It's up to the jury's recollection.

MR. BOITEL: It has reached a possible Bruton problem.

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THE COURT: You have an exception but I am not going to go into that.

MR. BOITEL: May I have an exhibit marked at this point?

THE COURT: What is it?

MR. BOITEL: It was turned over to us.

THE COURT: I want to go ahead with the charge. The jury has been very patient.

(Jury present.)

THE COURT: Madame Forelady, as you are, Mrs. Graham, by occupying the first chair, and ladies and gentlemen of the jury:

First of all, I would like to join with the lawyers in thanking each of you for the care and attention you have shown during this trial. You have been through rain and sleet and cold and it has not kept you from performi your very important task of sitting on this jury. I want you to know that I appreciate the sacrifices I know each of you has had to make in your own personal lives so that you could serve in this very important public capacity. I am sure you will give me the same degree of attention that you have shown throughout the trial so you may fully understand the principles of law which govern this case.

Now, the lawyers during their summations discussed

the law with you. Forget that and listen to my instructions as to the law and follow them.

You remember I told you at the outset that it's your duty here to weigh the evidence calmly and dispassionately, without any sympathy and without any prejudice for either the government or either of these two defendants. I told you that everyone appearing before this bar of justice is entitled to a fair and an impartial trial, regardless of his occupation or station in life. I told you at the outset that the subject of the trial is narcotics, in this case cocaine. I said to you then, and you promised me at the time, that though the subject matter was narcotic drugs, that this would not create any bias in your mind or prevent you from rendering a fair and impartial verdict.

Of course, you must remember also, ladies and gentlemen, that the narcotics traffic is characterized by concealment and guile. If policemen went out with badges they probably wouldn't get many violators. The government must necessarily use undercover agents and informers, and you heard testimony about that, if they are to apprehend alleged violators of the narcotics laws.

I told you your verdict must be based solely on the testimony you heard on the witness stand and any

exhibits which were received at trial and on stipulations of counsel and on nothing else at all. I told you it's my duty to instruct you as to the law, but that you ladies and gentlemen are the exclusive judges of the facts. It's not what a lawyer says a witness testifies to or what he says a document contains or shows, or what I might say on these subjects, but what you, the jury, remember and decide.

I told you at the outset that if during the trial you observed me having conversations with the lawyers, and indeed I did have conversations, I told you then to pay no attention to them. They dealt with matters of law or administrative matters. But above all, ladies and gentlemen, draw no inferences from anything I may have said during this trial that I favor one side or the other here, because, of course, I don't. That is your function and not mine.

Now, throughout my charge I will instruct you that you may not convict either of these defendants unless and until you are satisfied that the government has proven each element comprising the crimes charged beyond a reasonable doubt. And what do we mean by beyond a reasonable doubt? Well, of course, the words suggest the answer. It's a doubt based on reason. It's a doubt which a reasonable man or woman might entertain.

But a reasonable doubt is not a fanciful doubt. It's not an imagined doubt. It's not a doubt that a juror might conjure up to avoid performing an unpleasant task. It's a reasonable doubt. It's a doubt which arises in a juror's mind because of something in the evidence in the case or the absence of evidence. It's the kind of doubt which would cause a reasonable man or woman in a more serious and important affair in his or her life to hesitate to act. And the burden is on the government to prove the guilt of the defendant beyond a reasonable doubt.

Now, the government need not prove guilt beyond all possible doubt, because if that were the rule few people, however guilty they might be, would ever be convicted. In this world of ours it's practically impossible for one to be absolutely and completely convinced of any controverted fact, which by its nature is not susceptible to mathematical precision or to mathematical certainty. So the law provides that the government must prove the guilt of a defendant beyond a reasonable doubt, but not beyond all possible doubt.

I remind you, as I told you at the outset, that the indictment here, and I will send a copy of the indictment into the jury room, that the indictment is merely the charges, the way the government brings into Court

individuals who it claims have violated the law. I told you that the indictment is not evidence of the guilt of either of these defendants, nor does it detract in any degree from the presumption of innocence with which the law surrounds each of these defendants until his guilt has been proven.

This presumption of innocence remains with both of these defendants throughout the trial and applies to the consideration of each of the essential elements of the crimes charged. And this presumption of innocence remains unless and until you, the jury, find that a defendant is guilty as charged. And each of these defendants has entered a plea of not guilty, and in doing so he has put into issue every material allegation in the indictment. As I have told you, the government must prove each and every element of the crimes charged beyond a reasonable doubt.

And if the government has not proven to you that a defendant is guilty beyond a reasonable doubt, then, of course, you must find that defendant not guilty.

Now, ladies and gentlemen, there are two defendants here, Mr. Antonio Veciana and Mr. Ariel Pomares. They are charged as two individuals, and the guilt or innocence of each of them must be passed upon by you separately.

Guilt or innocence is a personal thing, and each of these defendants has the right to the same consideration on your part as if he were being tried alone.

Also you will notice the indictment has two counts in it. The first count being the conspiracy count and the second count relating to the attempted sale of the cocaine in New York. Each of these counts must be considered by you separately as well as to each defendant. And the fact that you may find a defendant guilty or not guilty on one count of the indictment does not control your verdict as to the other count of the indictment.

Now, you have heard the testimony marshaled for you by the lawyers this morning. They marshaled it in considerable detail. As I listened to them I think they brought in every one of the witnesses who testified before you . They talked about their testimony. Of course, it's not what they say or what I say. It's your recollection that controls. So I am not going to review the evidence with you again. But as I understand it here, the government is contending that each of these two defendants, Mr.Veciana and Mr. Pomares, conspired with Barres to obtain cocaine in Bolivia and to sell or distribute this cocaine in the United States. And the government contends that in pursuance of this conspiracy they sought to

distribute some seven kilograms of cocaine at the Taft Hotel on July 23, 1973, to John Bruno, who turned out to be an undercover agent.

Of course, each of these two defendants, Mr. Veciana and Mr. Pomares, deniesthe government's contentions They deny that there was a conspiracy, or if there was one they deny that they were members of it. And each of them denies that he had anything to do with the attempted sale by Barres of the cocaine to Bruno.

Defendant Veciana, as I understand it, and here again it's your recollection that controls, contends, through the testimony of his daughter Ana, that he did not participate in the delivery of the cocaine to Barres in Miami.

Now, ladies and gentlemen, there are two federal statutes involved in this case. The first one is titles 21 of the United States Code, Section 841(a) which provides, to the extent here relevent, "It shall be unlawful for any person knowingly or intentionally to distribute or possess with intent to distribute a controlled substance."

Now, what is a controlled substance? Well, the subject matter here is cocaine. The parties have stipulated that the contents of these packages was cocaine, and cocaine is a controlled substance, as those words are

used in the statute.

Then Section 846 of Title 21 of the United States Code provides that any person who conspires to distribute or possess with intent to distribute a controlled substance like cocaine is guilty of the crime of conspiracy. And under the law conspiracy is a separate crime from the attempted distribution of the cocaine.

So in the indictment you will observe here that the first count charges conspiracy, while the second count charges the attempted sale of the cocaine.

Now, going to count 1 of the indictment, which I remind you again is merely the charge and is not evidence, count 1 reads: "The Grand Jury charges from on or about the first day of November 1972,"--there is nothing magic about that date. I think there was testimony of some things that happened before, but so far as this indictment is concerned you must find that a conspiracy existed between November 1, 1972 and the filing of this indictment, which was January 4, 1974. So the indictment says,"From on or about the first day of November 1972, and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York, Antonio Veciana and Ariel Pomares, the defendants, and Augustin Barres, a co-conspirator, and others to the Grand Jury unknown

unlawfully, intentionally and knowingly combined, conspired, confederated and agreed together, and with each other, to violate --" the statutes I read to you a moment ago.

"Two, it was part of the said conspiracy that the said defendant unlawfully, intentionally and knowingly would distribute and possess with an intent to distribute Schedule I and II narcotic drug controlled substances, the exact amount thereof being to the Grand Jury unknown, in violation of these statutes."

So here the government is contending, and of course each of the defendants deny, that there was a conspiracy to distribute cocaine during this period between November 1, 1972 and January 4, 1974, and that each of the defendants, Veciana and Pomares, was a member of that conspiracy. And here you will recall the evidence as to the various things that Mr. Barres testified about and the various documents which were received during the trial.

The government contends that the evidence proves beyond a reasonable doubt that there was a conspiracy here to sell cocaine in the United States and that the defendants, Veciana and Pomares, were members of that conspiracy. Again, each of the defendants denies there was a conspiracy or that if there was, each of them denies that he was a

member of it.

Now, as I mentioned to you, ladies and gentlemen, in considering the conspiracy charge you will consider each defendant separately. And there are three elements which you must consider with respect to each of the defendants, and the government has the burden of proving each of these three elements with respect to each defendant beyond a reasonable doubt. First, that there was a conspiracy here to distribute cocaine; second, that the defendant you are considering unlawfully, willfully and knowingly became a member of that conspiracy, knowing that its purpose was to distribute cocaine; and third, that at least one of the overt acts set forth in the indictment, and I will read them to you in a minute, was committed in the Southern District of New York by one of the members of the conspiracy, but not necessarily the defendant you are considering. And that the overt act was committed in furtherance of the conspiracy.

So the first element here, was there a conspiracy? And you will ask what is a conspiracy. A conspiracy is nothing more nor less than a partnership in crime. It's a combination of two or more people to violate the law in some way. Here it's contended that the conspiracy was a partnership in crime to distribute cocaine in the United Sta

Of course, the government need not prove there was any formal agreement or contract between the conspirators stating the objects of the conspiracy or how it would be carried out, because people who conspire to violate the law are hardly likely to put their agreements or understandings in writing. But, on the other hand, the government must prove here that the members of the conspiracy came to an understanding for the purpose of accomplishing the unlawful purpose; that is, the distribution of cocaine in the United States.

So here consider all the evidence and determine whether you find there was a conspiracy, a partnership in crime to distribute cocaine. And if you do, a conspiracy is presumed to continue until either its purposes have been accomplished or until a participant withdraws from it. And if you find there was a conspiracy here, then you reach the second element which the government must prove beyond a reasonable doubt, and that is whether the defendant you are considering was a member of that conspiracy. And here during the trial you recall I received some evidence subject to connection--do you remember I used those words, subject to connection? I think it was on the first day of the trial. An example of that is Government's Exhibit 2, a check drawn by Barres payable to the order of Veciana.

Another example is Exhibit 3, the safe deposit record in Miami, showing it was opened by the defendant Pomares.

Now, the connection I had in mind, ladies and gentlemen, is that before you can consider this evidence with respect to the defendant you are considering, say before you can consider the check drawn by Barres to Veciana with respect to Pomares or the safe deposit record with respect to Veciana who is not mentioned in the record, you must first have found that there was a conspiracy here, and second, that the defendant you are considering was a member of that conspiracy. Because, as I mentioned to you, a conspiracy is a partnership in crime and every member of the conspiracy is responsible for whatever any other member of the conspiracy does in furtherance of the conspiracy.

But you may not find membership in a conspiracy merely because the defendant you are considering may have known others whom you think were conspirators, or may have known that some of them were conspiring to sell cocaine, or that he may have been present at the same place with some of the other people whom you think may have been conspirators. You may not find the defendant you are considering to be a member of the conspiracy unless you find that he knowingly and willfully joined the unlawful scheme, knowing that the purpose was to distribute cocaine in the United States.

So if you find there was a conspiracy here, then in determining whether the defendant you are considering was a member of the conspiracy, ask yourselves did that defendant knowingly and willfully join the conspiracy, with knowledge that his acts were a significant part in the unlawful enterprise which the conspiracy was formed to carry on.

So here consider the evidence as to that defendant's own acts, his own statements, his own conduct, and consider the evidence as to the acts and statements of others which you, the jury, find bear on the issues as to whether the defendant you are considering was a member of the conspiracy.

Now, the guilt of a conspirator is not measured by the extent or duration of his participation and is not measured by whether his role in the conspiracy was a major or minor one. He is equally guilty if you find that he did participate in the conspiracy. But to find that you must find that he knew the purpose of the conspiracy was to distribute the cocaine.

So applying those standards, ladies and gentlemen, if you find that the government has not proved beyond a reasonable doubt that there was a conspiracy here, or if you find there was such a conspiracy, the government

has not proved beyond a reasonable doubt that the defendant you are considering was a member of the conspiracy, then you would find that defendant not guilty.

On the other hand, if you find there was a conspiracy and that the government has proved beyond a reasonable doubt that the defendant you are considering knowingly and willfully joined the conspiracy, then you reach the third element which the government must prove beyond a reasonable doubt, and that is whether one or more of the members of the conspiracy, and not necessarily the defendant you are considering, because , as I told you, this is a partnership in crime, committed at least one of the overt acts charged in the indictment in the Southern District of New York.

Now, the indictment charges, and I repeat it's merely a charge, "In pursuance of the said conspiracy and to effect the objects thereof, the following overt acts were committed in the Southern District of New York and elsewhere: One, on or about July 21, 1973,Antonio Veciana, Ariel Pomares, and Augustin Barres met together at 111 International Hotel, Italian Village, Miami, Florida. "

"Two, on or about July 21, 1973, Antonio Veciana delivered approximately 10 kilograms of cocaine to Ariel Pomares in a parking lot in Miami, Florida."

Summarizing the conspiracy count, ladies and gentlemen, the government must prove beyond a reasonable doubt with respect to the defendant you are considering, and you consider them separately, first, that there was a conspiracy; second, that the defendant you are considering knowingly and willfully joined that conspiracy, knowing that its purpose was to distribute cocaine; and third, that at least one of the overt acts which I read to you was committed in the Southern District of New York, not necessarily by the defendant you are considering, but that it was committed by a member of the conspiracy in furtherance of the conspiracy.

Now, so much for the conspiracy count, ladies and gentlemen, which is count 1. Turning now to count 2, count 2 reads, "The Grand Jury further charges on or about the 23rd day of July, 1973, in the Southern District of New York, Antonio Veciana and Ariel Pomares, the defendants, unlawfully, willfully and knowingly did distribute and possess with intent to distribute a schedule 2 narcotic drug-controlled substance, to wit, approximately seven kilograms of cocaine hydrochloride."

This, as I recall it, ladies and gentlemen, refers to the delivery of the seven kilograms of cocaine to Bruno at the Hotel Taft. You remember that Bruno turned

out to be an undercover agent. At that time he had a different identity so far as Barres was concerned. Here the government is contending that each of these defendants, Veciana and Pomares, distributed and possessed with intent to distributethe cocaine which is the subject matter of the second count, and each of the defendants denies the government's contentions.

Here again, consider each of the defendants separately.

Now, here in count 2, the government must prove beyond a reasonable doubt that the defendant you are considering did distribute or possess with intent to distribute the cocaine. The second element is that the defendant you are considering was acting unlawfully, willfully and knowingly, that he knew what he was doing. The third element is that the substance involved was cocaine, and here, of course, there is a stipulation so there is no dispute that here the substance was cocaine.

Now, you remember the statute I read to you a few minutes ago talks about to distribute or possess with intent to distribute. What does distribute mean? It means a sale or delivery, any passing of narcotics from one person to another. If you find that the defendant you are considering did knowingly pass the cocaine to somebody else,

that is distribution.

Then the statute talks about possession with intent to distribute. Well, what is possession? Possession here means that you have a package in your hand, a package of cocaine in your hand. That's possession. So if A passes cocaine to B, as part of a plan to distribute the cocaine, both A and B have possession with intent to distribute, as those words are used in the statute.

Now, you will have to consider the conspiracy count, ladies and gentlemen, before you reach the second count. And if after considering the conspiracy count you find that the defendant you are considering was a member of the conspiracy charged in count 1, and if you find that the attempted delivery of the cocaine to Detective Bruno was committed by a member of that conspiracy and in furtherance of the conspiracy, then you may find the defendant you are considering guilty of the crime charged in count 2 even though he was not at the Taft Hotel. Because, again, as I told you, a conspiracy being a partnership in crime, every member of the conspiracy is responsible for whatever the other members of the conspiracy may do in furtherance of the conspiracy.

However, if you find that there was no conspiracy or that if there was, that the defendant you are considering

was not a member of it, or that the crime charged in count 2, the attempted delivery to Agent Bruno, was not done in furtherance of the conspiracy, then you may not find the defendant you are considering guilty under count 2 unless you find that he aided and abetted Barres in the delivery of the cocaine. And here there is another federal statute, Title 18, section 2, which provides, to the extent relevant, that, "Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal." However, before you may find the defendant you are considering guilty of aiding and abetting, you must find that the government has proved beyond a reasonable doubt that the defendant you are considering may have acquiesced in what the others did, nor is it sufficien that he may have known that a crime was being committed or be nearby. Here to find the defendant you are considering guilty of aiding and abetting, you must find that he knwoingly and willfully participated in the venture, knowing that its purpose was to distribute cocaine; that he had a stake in the venture, knowing that its purpose was to distribute cocaine; that he had a stake in the venture, final or otherwise, and that he sought to make the venture his own.

So summarizing the elements in count 2, ladies and gentlemen, and you will consider each of the defendants separately, the government must prove first that the defendant you are considering did distribute or possess with intent to distribute the cocaine, or that he aided and abetted the one who made the distribution. Second, that he acted willfully, knowingly and unlawfully, that he knew what he was doing. Finally, he knew that the substance was cocaine.

You will see from this review, ladies and gentlemen, that one of the elements which the government must prove beyond a reasonable doubt here is the knowledge and intentions of the defendant you are considering. In other words, the government must prove beyond a reasonable doubt that he acted knowingly, willfully, unlawfully; that he had a criminal intent.

How do you determine that? Well, of course, an act is done knowingly and willfully if it's done voluntarily and purposely. And an act is done knowingly, willfully and unlawfully if it's done with an evil motive or purpose, such as the purpose of distributing cocaine. But an act is not done willfully, knowingly or unlawfully if it's done by a mistake or by carelessness or by any other innocent reason.

Now, obviously it's impossible to prove exactly what was in the mind of the defendants you are considering or to know what his intentions were on these occasions. We can't look into his mind and see what knowledge he had at the time to determine his specific intentions, but these are matters which you, the jury, must determine from a careful consideration of the facts and circumstances that are brought out by the evidence and the inferences which you find may reasonably be drawn therefrom. Knowledge and intentions of the defendant may only be understood when put in the context of the circumstances surrounding his acts and the inferences which you, the jury find, may reasonably be drawn therefrom.

You might ask yourselves whether these transactions were normal or whether the were abnormal, whether they were open or surreptitious, whether you think that the background of a defendant made it likely or unlike that he fully understood what he was doing, whether the defendant had a motive, whether he had a financial or other interest in the outcome. These are the kind of questions, and of course not the only ones, that you should ask yourselves in order to determine the knowledge and intentic of the defendant you are considering. I don't suggest any answers to these questions, ladies and gentlemen. In

your own daily affairs you are continuously called upon to use your own common sense and experience to determine from the actions or statements of others w hat their real intentions and purposes are. And please do this with respect to each of these defendants.

Now, you will recall on, I think it was, Barres' testimony, that he testified as to prior arrangements between him and the defendants and prior sales of cocaine in Miami through the Midget. Some of these arrangements and sales, if they occurred, are not covered by this indictment. I gave you the dates and you will see them in the indictment. Any evidence as to prior arrangements or sales should be considered by you only in determining whether you find that there was a conspiracy as charged here in the first count of the indictment. and when you consider the knowledge and intent of the defendant you are considering with respect to both counts of the indictment.

Then you recall, ladies and gentlemen, that Agent Pinol, testified that Mr. Pomares made certain statements to him in SanJuan following his arrest. I think this was discussed in considerable detail by Mr. Boitel and also the government this morning. Now, first of all, you will consider these statements only with

respect to the defendant Pomares. You will not consider them with respect to the defendant Veciana.

In considering these statements, ladies and gentlemen, give them such weight as you think they deserve under all the circumstances which have been brought out in the evidence in the case.

Now, in considering the evidence, ladies and gentlemen, bear in mind that the law recognizes two types of evidence, direct evidence and circumstantial evidence. Direct evidence is testimony of a witness who personally observed or participated in the activities described. Circumstantial evidence consists of circumstances from which the jury may infer by a process of reasoning certain facts which are sought to be established as true. During this rainy, snowy week last week some of you may have gone into your apartments and somebody there was watching the television and they looked at you and either your hat and coat were wet or it was white, and they would look at you and say, "Gee, it's raining outside or snowing." Now, they didn't look outside. They looked at you. Looking at your coat and hat and by a process of reasoning they concluded that it was raining or snowing. That is circumstantial evidence.

There has been quite a bit of

circumstantial evidence in this case. There have been hotel registrations and various things. Both direct evidence and circumstantial evidence are good evidence and no greater degree of certainty is required where the evidence is circumstantial than where it's direct, because in either case the government must prove to you beyond a reasonable doubt the guilt of the defendant you are considering. Of course, different inferences may be drawn from the evidence, whether the evidence is direct or circumstantial. The government asks you to draw one set of inferences. The defendants may ask you to draw another . But it's for you, the jury, alone to decide what inferences you will draw from the evidence and what facts you find have been proven. But, of course, these inferences must be reasonable inferences based on the evidence or lack of it.

Now, another point here which is very important in this case is the credibility of the witnesses, and you heard the lawyers this morning talking about credibility at great length, as I recall. Of course, you, the jury, are the sole judges of the credibility of the witnesses who appeared before you. Of course, you subject the testimony of all these witnesses to the same standards, whether they are called by the government or by the defendan

It's the quality of the testimony, not the quantity of the testimony. It's the testimony you think presented a true picture of what happened.

In considering how to determine whether the witnesses are credible, ladies and gentlemen, again please use your everyday common sense. You saw them testify. How did they impress you? Did you think they were testifying frankly, candidly, fairly? Here again, apply your common sense and experience just as you do in determining an important matter in your own lives when you are called upon to decide whether you have been given the true picture of a given situation. I think you will consider a witness' demeanor, you will take into account his age, background, occupation or business. You will consider his candor or lack of it, his possible bias, the accuracy of his recollection. You will consider whether you find a witness' testimony is supported or whether you think it's contradicted by other credible testimony or circumstances.

Then I think you will consider whether a witness has an interest in testifying the way he does, because where a witness has an interest, there may be a temptation for him to color his testimony or perhaps even to withhold facts. Now, of course, here there were several government agents. I think there was Agent Pinol, Detective Bruno,

some others. Of course, they are law enforcement officers. They have an interest in prosecuting people whom they believe may have violated the law. So they have an interest.

Then, of course, you remember the young lady, Miss Veciana, the defendant Veciana's daughter, she has a family interest. So you may consider her interest, too. Consider whether you believe any witness which has been affected by his or her interest, and if so to what extent. This does not mean that a witness will falsify because he or she has an interest. It's merely a factor which, you the jury, may consider.

You will recall that neither of the defendants took the stand here. I should say to you that there is no requirement that they should. This must not enter into your deliberations in any way, and draw no inferences whatsoever by reason of the failure of either of the defendants to testify before you. Because the government, as I have tried to explain to you, has the burden of proving the guilt of a defendant beyond a reasonable doubt. A defendant is not required to prove his innocence.

Regarding Mr. Barres' testimony, Mr.Barres told us he was guilty of this conspiracy. He testified at great length about it. He told us he is guilty and he is awaiting sentence. He is obviously in the role of a

co-conspirator here. Now, his testimony should be given such value and weight as you deem proper under all of the circumstances. A co-conspirator's testimony by itself is sufficient to convict, if you believe it, and it convinces you of the defendant's guilt beyond a reasonable doubt. However, Mr. Barres' testimony should be subjected by you to very careful and searching scrutiny.

A witness may be discredited or impeached by contradictory evidence or by evidence that he made statements at other times inconsistent with his present testimony. And if you find any witness has been impeached or discredited, it's your exclusive province to give the testimony of that witness such credibility as you think it deserves. If you find that a witness has testified falsely to you, you can reject all his testimony. Or you may accept part of his testimony if you find it reliable and you may reject the rest.

I will repeat again, and I think I mentioned it to you before, that you will consider each of the two defendants separately and you will consider each of the two counts separately as to each defendant.

You have the right to see any exhibit which has been introduced in evidence. Just let me know by telling the Marshal.

Ladies and gentlemen, jury deliberation is one in which everybody joins and expresses views, exchanges views. Don't be afraid to change your original view because of pride of opinion or stubbornness or any other reason, if after discussion with your fellow jurors you become convinced that your original view was wrong. But on the other hand, ladies and gentlemen, never surrender your honest conviction at any time. Never surrender your honest conviction because of the opinion of your fellow jurors or because you are out-voted. And you will seek to arrive at a verdict here, providing you can do this consistently with the conscientious convictions of each and every one of you. Of course, it's important both to the government and to these defendants that this case be decided by you, and you will understand that this being a criminal case your verdict must be unanimous. It's a verdict reflecting the conscious convictions of each of you.

If you find, after reviewing all the evidence, ladies and gentlemen, that the defendant is not guilty, please do not hesitate for any reason to render a verdict of not guilty. On the other hand, if you find that the law has been violated by a defendant as charged, you must not hesitate to render a verdict of guilty because of sympathy or for any other reason at all. And please do not

consider the question of possible punishment of a defendant in case you find him to be guilty. This must not enter into your deliberations in any way. The duty of imposing sentence rests upon the Court. And please do not allow the consideration of possible punishment to affect you or make you seek to avoid the performance of an unpleasant task.

In conclusion, ladies and gentlemen, I am sure that if you listen to the views of your fellow jurors and if you apply your common sense you will reach a fair verdict in this case. And remember, that your verdict must be rendered without fear, without favor, without prejudice, and without sympathy.

Ladies and gentlemen, there are two counts in the indictment and your verdict will be, on count one, guilty or not guilty with respect to each of the two defendants, Veciana and Pomares. Count two it will be guilty or not guilty as to each of the two defendants, Messrs. Veciana and Pomares.

Will counsel come forward, please.

(At the side bar.)

MR.BOITEL: I request the Court charge that the jury may completely disregard the confession or the alleged admission of my client.

THE COURT: No, I wouldn't charge that. Anything else?

MR. BOITEL: Well, I said it before but just to make the record complete, I believe it should specifically be recalled to the jury the testimony of Mr. Lopez, the testimony of the time--

THE COURT: All right.

MR. GARBER: I would bring up, at the beginning of your Honor's charge, I certainly knew your Honor was going to talk about undercover agents and I didn't object to that. I feel it's not appropriate to talk about narcotics necessarily be a concealed type of operation.

THE COURT: I am afraid it is.

MR. GARBER: I agree.

THE COURT: I will give you an exception on that. Anything else?

MR. GARBER: No.

THE COURT: How about you?

MR. LITTLEFIELD: No, your Honor.

(In open court.)

THE COURT: Mr. Davis and Mr. Rosen, as the alternates, in spite of all the snow and rain, we have reached the final stage now so it's my pleasant duty to excuse you now. I just want you to know how greatful we all

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are that you participated in this trial. With the weather we had been having, if somebody wasn't able to make it, we would have needed you very badly. You can see what could have happened. I want to thank you both very much. I hope that you found this experience interesting and I would like to wish you a lot of luck in your future endeavors, whatever they may be, including, hopefully, I will see you on another jury.

What are their instructions?

THE CLERK: Report back to the central jury part on the first floor.

THE COURT: Thank you very much.

(Alternate jurors were excused.)

(The marshals were duly sworn.)

THE COURT: Mr. Wallace, mark this copy of the indictment as a Court exhibit and then show it to counsel and then it can be taken into the jury room. I think it's all right.

(Court's Exhibit 1 received in evidence.)

THE COURT: Mrs. Graham, were you approached about getting sandwiches?

THE FORELADY: Yes, your Honor.

THE COURT: And you all ordered sandwiches. Hopefully they will be there.

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Are they there?

THE MARSHAL: I don't know, your Honor.

THE COURT: You will check on that because that is an important item I want to get done.

Have you a question?

MR. BOITEL: The indictment was passed to me. Is that going to the jury?

THE COURT: I wanted you to see it.

Give it to the forelady. That is to keep track of these two counts which I told you I wanted discussed separately. The first count is the conspiracy count, the second count being the distribution count.

Thank you very much.

(Jury retires at 1:45 P.M.)

THE COURT: Gentlemen, I will give to Mr. Wallace the government's requests to charge and also Mr.Boitel's single request on the weight to be given the alleged admission. I will ask him to mark those as Court Exhibits so they will be in the record.

** (Court's Exhibits 2 and 3 received in evidence.)

MR. BOITEL: Your Honor, I will probably forget this later on if I don't say it now. Earlier in this case at the pre-trial hearing, which has been the subject of some discussion, the minutes of that proceeding were sealed

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because of some discussion which turned out to be nothing concerning the C.I.A., if you may recall. I wonder if your Honor will direct those minutes be unsealed.

THE COURT: I am not sure I recall the occasion. I get so many of these things.

Do you recall the occasion?

MR. LITTLEFIELD: I know something was sealed. It was Mr. Bannigan who was there then, so I don't know.

THE COURT: I don't think the minutes have ever been transcribed.

MR. BOITEL: They were not, your Honor. Everything was sealed because there was some mention of whether the C.I.A. was involved in this and I am sure it came to nothing. That's why it was sealed.

THE COURT: All right, I will be glad to look into that. We did have the reporter up the other day. I don't think it has been transcribed.

MR. BOITEL: They never were. It was understood they would not be because of that problem.

THE COURT: I will tell you this, Mr. Boitel. In the event of an appeal I certainly want to see them made available. Is that really what your point is?

MR. BOITEL: Precisely, your Honor.

THE COURT: I will certainly see that. I am

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sure the government would agree to that.

MR. LITTLEFIELD: Yes, your Honor. On that point I might say the government did make an investigation with both the C.I.A. and the F.B.I. and there was no information relevant to this case by either agencies, at least that they were willing to give us.

THE COURT: All right . I will be sure and see that that happens.

MR. LITTLEFIELD: The following 3500 material was turned over to defense counsel at the appropriate time prior to the testimony of the various witnesses. First, with respect to Mr. Barres, his complete statement to Det. Scamardella at the time after his arrest in New York. Secondly, his Grand Jury testimony. Thirdly, the reports of Det. Bruno relating to the conversations between Bruno and Barres. Also we made available to defense counsel all the tapes on which Mr. Barres' voice appeared, including the undercover tapes and the tapes of his statement after he was arrested.

With respect to Mr. Nunez, defense counsel were shown one page of handwritten notes of the Assistant U.S. Attorney Littlefield, in connection with his testimony.

In connection with Mr. Carpio's testimony, defense counsel were shown three pages of Mr. Littlefield's

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handwritten notes.

With respect to Mr. Lopez and Figueroa, defense counsel were shown their Grand Jury appearances in Florida.

With respect to Mr. Pinol, defense counsel were shown his transcript of the confession and his report describing the arrest of Pomares.

With respect to Mr. Bruno, his agents' reports were also turned over.

(In the robing room, all counsel present.)

THE COURT: Gentlemen, I have received two notes from the jury. One I think that my law clerk showed to you and I received another one while I was on the bench saying, "We never received the list of stipulations as read by Mr. Littlefield. The stipulations agreed upon by Mr. Littlefield and defense counse." I guess the answer is that was all done on the record, wasn't it?

MR. LITTLEFIELD: Yes, although there was a written stipulation that was signed by the parties as well.

(Discussion off the record.)

THE COURT: This stipulation, give it to the marshal to take into the jury.

Where is the stipulation?

MR. LITTLEFIELD: Right here, your Honor.

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I am just checking through to make sure it's okay, if I may do that.

THE COURT: Yes.

(Pause.)

THE COURT: Take that in and give it to the jury.

(Court's Exhibit 6 received in evidence.)

THE COURT: Now, the record of the safe deposit box has gone in, application of the lease has gone in, the $10,000 check has gone in, consent slip signed by Pomares, I take it, in Spanish.

MR. LITTLEFIELD: We didn't send that in because you will remember the Spanish one is not in evidence; the English one is.

THE COURT: The English has gone in?

MR. LITTLEFIELD: No.

THE COURT: I think you had better send the English one in. That is the thing that was waved around this morning.

MR. LITTLEFIELD: If they had asked for the one in Spanish, I didn't want there to be a misunderstanding that there wasn't one in Spanish.

THE COURT: I will put a slip on here. "The one in English has been sent to you."

There wasn't any in Spanish, was there?

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MR. LITTLEFIELD: Yes, there was. Your Honor ruled it out because of the picture on the back.

THE COURT: The one in Spanish has not been received in evidence.

Next one is final statements of Barres.

MR. LITTLEFIELD: They were not received in evidence, your Honor.

MR. BOITEL: I wonder if I might make the record complete on this for the moment, Judge. On the day that those final statements were offered in evidence by me, later in the day Mr. Littlefield took them. Apparently sometime while in the possession of the U.S. Attorney's Office, Mr. Barres got them--

MR. LITTLEFIELD: I gave them to him to look at in case they came up again.

MR. BOITEL: He apparently took them with him so they are not available in any event. However, I should note that they were offered in evidence and they were not received in evidence.

THE COURT: All right. Then I will put here--

MR. LITTLEFIELD: He has mailed them back. They are in the same boat. They just were not received in evidence either.

THE COURT: I will put here that the final

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statements were not received in evidence.

MR. BOITEL: Your Honor, may the jury be advised that they may hear the testimony with regard to the final statements?

THE COURT: They will come back if they want that.

Okay, I propose to send that into the jury with the note, all right.

MR. GARBER: Yes, sir.

THE COURT: Is that all right, Mr. Boitel?

MR. BOITEL: Certainly.

THE COURT: I will give that to the clerk and tell him to send that into the jury.

(Jury note as 3:02 P.M.)

(In the robing room.)

THE COURT: I received a note from the jury. It reads: "In order for us to bring in a guilty verdict on the second count, is it necessary that Veciana knew that the cocaine was to be sold in the southern District of New York?"

I thought of answering that by saying no, but you must find either that he was a member of the conspiracy or that he aided and abetted in the distribution, as was mainly my instructions.

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MR. GARBER: On behalf of Mr. Veciana I would object to the further explanation. I think the jury has had the benefit of the instructions. If you go into that possibly the question of definitions comes up, and so forth.

THE COURT: You would rather have me answer it no?

MR. GARBER: No, I would rather have you answer it that they are to rely upon their recollection of the Court's instructions and the testimony that has been given.

MR. LITTLEFIELD: I think when they ask a specific question of law that we should do our best to answer it, either by reading back the charge or by agreeing on a statement of what the law is.

THE COURT: I am quite satisfied as to what the law is. I think the answer is no, but they have to find that he was a member of the conspiracy or that he aided and abetted, the way I instructed them.

MR. LITTLEFIELD: And this was done in furtherance of the conspiracy while he was a member.

(Pause.)

THE COURT: Well, this is what I have written down, gentlemen.

"No, but you must find that either Veciana was a member of the conspiracy and that the distribution was in

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furtherance of the conspiracy, or that he aided and abetted in the distribution as explained in my charge.

MR. GARBER: For the record again, I would respectfully object to it.

MR. LITTLEFIELD: That's fine, your Honor.

THE COURT: You do not have any feeling, do you?

MR. BOITEL: It doesn't appear to reflect upon my client.

THE COURT: I think this is right. What I will do with that, gentlemen, is to write it on the bottom of their note and send it back to them.

MR. GARBER: Yes, your Honor.

(Pause.)

THE COURT: Yes, I have written this:

"No, but you must find either that Veciana was a member of the conspiracy and that distribution was in furtherance of the conspiracy or, underlined, that Veciana, aided and abetted, in the distribution, as these terms were explained in my charge."

MR. LITTLEFIELD: That is fine with the government.

THE COURT: All right, you have an exception. Take that into the jury.

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(Jury returns with a verdict at 3:30 P.M.)

(The roll is called.)

BY THE CLERK:

Q Madame Forelady, has the jury reached a verdict?

A Yes.

Q How do you find against the defendant Antonio Veciana on count one?

A Guilty.

Q On count two?

A Guilty.

Q The defendant Ariel Pomares on count one?

A Guilty.

Q And count two?

A Guilty.

THE CLERK: Members of the jury, listen to your verdict as it stands recorded. You say the defendant Antonio Veciana guilty on counts one and two, the defendant Ariel Pomares guilty on counts one and two and so say all of you.

THE COURT: Do you want the jury polled?

MR. BOITEL: Yes.

(Jury polled.)

THE CLERK: The jury stands polled.

THE COURT: Ladies and gentlemen, these are difficult things to do and I never comment on a jury verdict. As I tried to explain to you earlier in the day, to my mind a jury verdict is a very sacred thing because it represents the conscientious convictions of twelve representative citizens. So I don't feel I have the right to comment on it or anyone else has a right to comment on it. But I do want to thank you very much for the care and attention, I want to thank you again, realizing as I do it isn't fun to do this. But I think you have done a perfectly splendid job as jurors throughout this trial and I want you to know that and I want to wish you a lot of luck in the future and to thank you on behalf of the Court for what you have done.

What are the instructions for the ladies and gentlemen?

THE CLERK: Jurors, if you will report back to the central jury part on the first floor, the clerk down there will give you your instructions for the balance of the week.

THE COURT: I would like to add this, ladies and gentlemen: You did such a human service during the snow and rain and all these things, if any of you would like to be excused from having to be served during the

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balance of the week, tell the jury clerk that and tell them I told you that you could be excused for the balance of the week.

Thank you very much.

(Jury excused.)

THE COURT: All right, any motions, Mr. Garber?

MR. GARBER: Your Honor, might I have leave to file in written form, appropriate motions?

THE COURT: Yes, I will be glad to give you that. If you do it, I would like you to do it so the government receives your motion papers ten days before the sentence date and has five days for the sentence date. Is that agreeable to you?

MR. GARBER: Yes, sir.

THE COURT: Mr. Boitel?

MR. BOITEL: May I do the same, your Honor?

THE COURT: You may do the same.

As to sentence date--

MR. LITTLEFIELD: Your Honor, the government would move at this point in view of the conviction, the defendants be remanded.

THE COURT: I will hear you on that in a minute. I would want to fix the sentence date first.

I think I would like to fix sentence for

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March 7th, gentlemen, if that is convenient. Will that be convenient, Mr. Garber?

MR. GARBER: Yes, your Honor.

THE COURT: Mr. Boitel?

MR. BOITEL: Yes, your Honor.

MR. GARBER: What hour would that be, your Honor?

THE COURT: It would be in the morning. Let's put it down at 9:30. That will be in room 2703. That is on the 27th floor of this building.

MR. BOITEL: 2703, your Honor?

THE COURT: 2703, that's right.

I would like a pre-sentence report with respect to each of the defendants, and I would be greatful if they would be cooperative with the probation department. I would like to know all the things about them other than the things I learned during the trial.

You would like to make a motion?

MR. LITTLEFIELD: Yes, your Honor. The bail situation as I understand it at present for Mr. Veciana is a $2,500 cash bond in Florida and the bail for Mr. Pomares was originally $50,000 cash. I believe that was reduced substantially, I think, but I am not certain whether it was reduced or not.

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MR. LITTLEFIELD: As I understand it, bail was subsequently reduced on Pomares to $5,000 cash.

Now, with respect to Mr. Pomares, your Honor, first of all, he is a Cuban and resides in Puerto Rico. The government has information that he has sold his house. The government has information that he and Barres agreed if they would ever be caught, Pomares would then be gone. So I think we run a substantial risk of flight in the case of Pomares now that he has been convicted. In the case of Veciana, your Honor, when he was arrested there were five or six passports of differing individuals, not him, found in his home. He is obviously a man of skill in terms of moving around between countries, and I think that he as well now having been convicted of this crime is a bail risk. So that is the government's position with respect to both of them.

MR. GARBER: Your Honor, with regard to Mr. Veciana, it's correct that he has heretofore been at liberty on $2,500 bail. It's also correct that he has made every Court appearance that has been required of him in this district, coming from the Southern District of Florida up here. It's also correct that he is a father and a husband, having five children residing in Miami, Florida where he is residing and will continue to reside.

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He no longer has his passport. In view further of the lack of any prior criminal record and his employment by the United States Government in the past, which has been testified to, I certainly think that continuance of the bail pending sentence will be entirely appropriate. I think a remand is certainly not indicated in this case. The only thing that counsel has stated would be the possession of some passports. Mr. Veciana has been engaged in anti-Castro activities for a period of time, some of which have been with the tacit understanding of the United States Government, from my understanding. I think he represents a proper party to be appropriately allowed on liberty pending sentence.

MR. BOITEL: Your Honor, as I understand it, it's correct that my client has been out on $5,000 cash bail. He advises me that he is the father of three children and lives with his wife. They have a house in Puerto Rico. When the U.S. Attorney indicated that there was some possibility that it was being sold I asked Mr. Pomares whether that was the fact. He said not only is it not the fact but he has made no effort to sell it.

He also advises me that he is a United States citizen.

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Since his arrest in this case or release on bail in this case I understand he has reported to the United States Marshal in Puerto Rico every Wednesday. I think his appearance in Court whenever required to be here, his prompt appearance, straight through this trial, etc., is testament to the fact that he is not likely to flee.

For those reasons I would ask his bail be continued pending sentence.

MR. LITTLEFIELD: In the alternative, the government would move that bail be increased substantially. The government would suggest in Mr. Veciana's case $50,000 cash or surety bond, and in Mr. Pomares' case the same, if the motion to remand is not granted.

MR. GARBER: Just in brief reply: The U.S. Attorney is saying he is really not concerned with Veciana appearing but he wants an increase in bail.

MR. LITTLEFIELD: The government is concerned about his not appearing.

MR. GARBER: My interpretation is in fact if he agrees to the principle of bond he is saying basically he has reason to believe this defendant will appear before the Court. To impose a financial hardship is not indicated in this case in view of the splendid record of

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appearance, in view of the family, in view of every other matter I have mentioned. He will appear before this Court at any time he is required to do so.

MR. LITTLEFIELD: I want to make very clear that this is a fall-back position, to put it mildly.

THE COURT: Gentlemen, these are very difficult decisions for a Judge to make. This was an enormous amount of narcotics involved here. There are unanswered questions certainly in my mind as to why all this was done, what the relationship was with the Cuban movement. I don't know. There are so many things that I don't understand. Inevitably, I am afraid that I am going to, whatever I have to do, these defendants will have to go to jail for what they have done. So although I don't like to do it at all and I have sympathy, great sympathy for the families of both the defendants, I am going to remand the defendants pending sentence and I hope that I will get some answers to some of these questions in the pre-sentence report. Of course, the defendant will receive credit for any time that they serve now on any sentence that might be imposed on them later.

(Court adjourned.)

* * *

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WITNESS INDEX

Name	Direct	Cross	Redirect	Recross
Augustin Barres	55			
(recalled)	256	266	291	
John Bruno	211			
(recalled)	452	480		
Octavio Pinol	226	235		
(resumed)		412		
Guillermo Figueroa	371	381	383	385
Gustavo Hoffman (interpreter.)				
Jose Ramon Lopez	391	394	397	
(recalled)	409	411		
Francisco Carpio	398	407		
Gustavo Hoffman (interpreter.)				
Enrique Nunez	429	434		
Octavio Pinol	492	502		
Ana Veciana	538	551	554	

EXHIBIT INDEX

Government	Identification	In Evidence
1	79	96
2		96
3		116
4	126	535
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6	163	536
7	166	200
8	170	
9	191	
9A,9B	193	
9B-1,10A,10B	194	

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Government	Identification	In Evidence
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7A,7B	199	199
7C		200
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17,18	517	
17		518
1,2,3,4,6,7,9		537
9A through 9I		537
10,10A,10B		537
11,12,13,13A,14		537
15,16,17		537
18		538
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EXHIBIT INDEX

Defendant	Identification	In Evidence
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Defendant Veciana		
A	274	
B	308	
Defendant Pomares		
A	349	
B	353/422	423
C	443	443

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[Same Caption]

S I R S :

PLEASE TAKE NOTICE that, upon the annexed affirmation of HENRY J. BOITEL, ESQ., and upon all prior proceedings heretofore had herein, the undersigned will move this Court before the Hon. Dudley B. Bonsal, United States District Judge for the Southern District of New York, on the 13th day of March, 1974, at 9:30 A.M. at Courtroom 2703 of the United States Courthouse, Foley Square, New York, New York, for an Order, granting the defendants Antonio Veciana and Ariel Pomares, a new trial, pursuant to Rule 33 of the Federal Rules of Criminal Procedure [in the interests of justice], the Fifth Amendment of the United States Constitution [due process of law, the right against self-incrimination, and requirement of trial by indictment], and the Sixth Amendment of the United States Constitution [confrontation and cross-examination of witnesses.]

New York, New York
March 11, 1974

Yours, etc.,

HENRY J. BOITEL
Attorney for Defendant Pomares
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(212) RE 2-8104

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25 West Flagler Street
Miami, Florida 33130
(305) 377-4963

AFFIRMATION IN SUPPORT OF DEFENSE POST-TRIAL MOTIONS

HENRY J. BOITEL, an attorney admitted to practice in the Courts of this State, affirms the following to be true under penalty of perjury, pursuant to Rule 2106 CPLR:

1. I was trial counsel for the above named defendant, Ariel Pomares. The co-defendant, Antonio Veciana, is represented by Barry L. Garber, Esq. At the request of Mr. Garber and Mr. Veciana, I make this affirmation in support of Mr. Veciana's motion for a new trial as well as the similar motion of Mr. Pomares.

2. Indictment No. 73 Cr. 793 charged that the defendants, together with an unindicted co-conspirator, Augustin Barres, conspired from November 1, 1972 until August 10, 1973 (the date of the filing of the indictment), to traffic in cocaine (21 U.S.C. § 846). A second count of the indictment charged that on July 23, 1973, the defendant Pomares possessed seven kilograms of cocaine hydrochloride with the intent to distribute same [21 U.S.C. §§ 812, 841(a)(1) & 841(b)(1)(a)]. On January 4, 1974, the eve of trial, the government filed a superseding indictment which added certain overt acts to the conspiracy count of the original indictment, and, additionally, named the defendant Veciana in Count 2.

3. The jury trial commenced on January 8, 1974, and

terminated on January 14, 1974, with a verdict of guilty on both counts as to both defendants.

4. The defendants respectfully submit that the jury verdict should be set aside and that they should be granted a new trial upon the following grounds:

I. Prior to Trial, the Government Unequivocally Waived Any Right It Might have to Introduce into Evidence Certain Pre-trial Admissions Allegedly Made by the Defendant Pomares. During the Court of the Trial, the Government Was Effectively Permitted to Rescind its Waiver to the Improper Prejudice of Both Defendants.

Long prior to trial, at a stenographically reported pre-trial conference, the Government unequivocally declared that it would not place in evidence a post-arrest statement allegedly given by the defendant Pomares. By the time of trial, the Government sought to change its position. A portion of the minutes of the pre-trial conference, however, revealed the following:

> "[Counsel for defendant Veciana]: There is another matter that obviously Mr. Bannigan and I discussed, and he has to make a decision on, and there is a potential severance problem under Bruton, since one of the defendants did give a statement and the other one did not.
>
> "Mr. Bannigan: I can resolve that right now. We will not use the statement.
>
> "The Court: You will not use the statement. Then there is no problem under Bruton." (Tr. 23-24).

In view of the above, the Court held that it was clear that the Government had unequivocally waived its right to use the statement at trial, and refused to permit the Government to reverse its position at the trial (Tr. 24-30).

Later in the trial, the trial prosecutor again sought to have admitted into evidence certain of the admissions allegedly made by the defendant Pomares. He claimed that, if there were any waiver, it was limited to the use in evidence of certain notes made by one of the agents while Pomares was being questioned at the agent's office shortly after the arrest. He claimed that this did not bar the government from using alleged oral admissions made by Pomares prior to the making of the notes (Tr. 207-211). Defense counsel responded that the distinction was one without a difference (Id.), and, in any event, that the testimony made clear that the written notes were an attempt to record all statements of Pomares (Tr. 247-250; see also, Tr. 485-490). The defense motion to exclude and, later, to strike, the statement was repeatedly renewed and denied (Tr. 444, 451, 491, 526-528).

As conceded by the prosecutor, the admissions in question, if credited by the jury, were the strongest evidence in the case (Tr. 4). There can be no doubt, therefore, that the defendant Pomares was thereby prejudiced. Additionally, counsel for Veciana made clear at the outset of the case that Veciana requested a severance if the admissions were to be used (Tr. 2), and the Government expressed its willingness to sever under those circumstances (Tr. 7). The problem appeared to be solved by the Court's initial holding that the Government would not be permitted to use the statement in view of its prior waiver. It was not until the midst of trial (Tr. 207-211), that the Government raised the issue again, and successfully prevailed upon the Court to modify its prior holding. The defendant Veciana respectfully submits that, notwithstanding the failure of those alleged admissions to directly inculpate him, the

positive effect of those admissions upon the jury and, particularly, upon the credibility of the Government witness, Barres, effectively swung the balance in the trial.

The defendants respectfully submit that, since the Government, in the presence of the Court and on the record, by an attorney then in charge of the case, clearly and unequivocally waived its right to use the statement, the Government should not have been permitted to reconsider and repudiate that waiver. The administration of justice should be even-handed. How can it be fair, on the one hand, if a layman such as Pomares, without counsel, can be held to have had irretrievably waived his right to remain silent and thus provide the Government with its strongest evidence, yet a similar, more voluntary and studied waiver by a Government attorney is permitted to be rescinded at trial? Once a defendant waives his right to speak, or his right to be searched, or his right to bring a timely suppression motion, he will rarely, if ever, be permitted to rescind the waiver. A fair and consistent construction of the rights of the litigants at a trial requires that the Government be held to no less a standard. That being so, the jury verdict should be set aside and the defendants should be granted a new trial at which the Government would be precluded from introducing into evidence on its direct case the alleged admissions of the defendant Pomares.

II. The Evidence at Trial Failed to Establish that the Alleged Admissions of the Defendant Pomares Were Voluntary or that Pomares Had been Properly Advised of His Rights.

In Miranda v. Arizona, 384 U.S. 436, it was held that:

> " * * * Any evidence that the accused was threatened, tricked, or cajoled into a waiver, will, of course, show that the defendant did not voluntarily waive his privilege." (384 U.S. at 476)

The burden of establishing a waiver by the accused is on the prosecution. This is based on the rule that the waiver of a constitutional right will not be lightly inferred. Johnson v. Zerbst, 304 U.S. 458. This rule applies to in-custody interrogations, as was here the case, and "a heavy burden rests on the Government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel" Miranda v. Arizona, 384 U.S. at 475. A valid waiver will not be presumed simply from the fact that a confession was obtained. Carnley v. Cochran, 369 U.S. 506. Indeed, " . . . the fact that the individual eventually made a statement is consistent with the conclusion that the compelling influence of the interrogation finally forced him to do so. It is inconsistent with any notion of a voluntary relinquishment of the privilege." Miranda v. Arizona, 384 U.S. at 476.

If psychological coercion is used in obtaining a confession, it can render the confession involuntary notwithstanding the fact that the interrogating agents went through the perfunctory ritual of advising him as to his rights. Gorman v. United States, 380 F. 2d 158 (1st Cir., 1967); Colombe v. Connecticut, 367 U.S. 568.

In United States ex rel Williams v. Twomey, 467 F. 2d 1248 (6th Cir., 1972), the Court condemned, in the following words, purported warnings which tend to encourage or mislead a defendant to forego his rights:

> "The entire warning is, therefore, at best, misleading and confusing and,

> at worst, constitutes a subtle temptation to the unsophisticated, indigent accused to forego the right to counsel at this critical moment." (467 F. 2d at 1250)

To be effective, the procedural safeguards imposed by the Miranda decision must be fully observed, and rights of suspects must be jealously guarded; not even the slightest circumvention or avoidance should be tolerated. United States v. Crisp, 435 F. 2d 354 (1970), cert. denied, 402 U.S. 947. If legal advice is given an accused at a pre-trial interrogation, such advice must be accurate. United States ex rel Vanderhorst v. LaVallee, 285 F. Supp. 233, aff'd., 417 F. 2d 411, cert. denied, McMann v. Vanderhorst, 397 U.S. 925.

At the instant trial, it was made clear that the defendant Pomares was encouraged, indeed, practically terrorized, into foregoing his rights. Every warning was contradicted by a contrary warning. Thus, upon his arrest, he was told that he could get fifteen years in prison (Tr. 420). Although he was allegedly advised of his rights three times, each such "warning" was counterbalanced by the assertion that he would be his own "best lawyer" and that he should cooperate with the Government (Tr. 421, 479, 485, 511, 513, 514, 515).

While the defendant submits that the use in evidence of his alleged admissions was a direct violation of his constitutional right to remain silent and of the directives contained in Miranda v. Arizona, supra, the prejudice was compounded by the failure of the charge to make clear to the jury, in accordance with the defendant Pomares' request to charge, that the jury had a right to completely disregard the alleged admissions (Tr. 583, 682).

Any reasonable doubt as to whether a defendant was

correctly informed of his right to remain silent must be re-

solved in favor of the defendant. United States v. Mullings, 364 F. 2d 173 (2nd Cir., 1966).

III. The Defendant Pomares Was Deprived of his Fifth Amendment Right to Remain Silent by the Testimony Elicited From Agent Pignol on Direct Examination to the Effect That Pomares Refused to Further Cooperate with the Government and Had Requested Immunity.

While the Government sought to draw some kind of an illusory distinction between oral statements given by Pomares prior to the note-taking of Agent Pignol and the events which thereafter followed (supra, Point I), the Government, itself, did not even pretend to observe such a distinction when it went on to continue its direct examination of Agent Pignol by eliciting from him the fact that Pomares exercised his right to terminate "cooperation" once he made bail and had a lawyer, and, further, that immunity had been requested in the defendant's behalf (Tr. 501). A motion for a mistrial was denied (Tr. 501, et seq., 527-528).

It is clear that having answered some questions, an accused may invoke his privilege at any time during in-custody interrogation. Cf. Rogers v. United States, 340 U.S. 367. When evidence is placed before the jury that a defendant has invoked his privilege, such evidence is, itself, a violation of the privilege. Pignol's testimony violated the defendant's Fifth Amendment right. That violation was compounded by the fact that Pignol was led by the prosecutor into giving such testimony. It was further compounded by the fact that the prosecutor's questioning violated the spurious distinction which the Government, itself, had drawn (see also Point

infra, and motion for mistrial based upon volunteered testimony of the witness Barres that the defendant Pomares would be the best source of information (Tr. 344).

IV. The Alleged Admissions of the Defendant Pomares Should Have Been Excluded Because They Were Obtained During a Period That the Arresting Agents Delayed in Bringing Him Before a Magistrate for Arraignment.

McNabb v. United States, 318 U.S. 332 (1943) and Mallory v. United States, 354 U.S. 449 (1957) made clear that the Congressional requirement of prompt arraignment would be enforced by a further requirement that a confession elicited during a delay in arraignment is to be rendered inadmissible. In the present case, the defendant was arrested at approximately 12:15 P.M. The fact gathering process to support the arrest had been completed long before the arrest. Nevertheless, the agents questioned the defendant at length and did not bring him before a Magistrate until sometime between 4:00 and 5:00 in the afternoon, and then, only when ordered to do so (Tr. 214, 243-244, 416). The point was clearly preserved and renewed at trial (Tr. 444, 451, 526-528).

V. The Defense Was Improperly Prejudiced by the Refusal of the Court to Permit the Admission into Evidence of the Financial Statements of the Defendant Barres.

Defense Exhibits A and B were financial statements of the witness Barres. Particularly in view of what were considered to be the evasive, argumentative, and contradictory responses of Barres with regard to his financial condition during the period leading to and including the time of the alleged conspiracy, the defense unsuccessfully offered those financial

statements into evidence (Tr. 361-362). The importance of that evidence in the minds of the jurors was evidenced by their request, during deliberations, for copies of those statements (Tr. 696). It is respectfully submitted that those statements were probative of the issues at trial and of Barres' credibility. The exclusion of those exhibits wrongfully prejudiced the defense.

VI. The Defendants Veciana and Pomares Were Wrongfully Prejudiced and Deprived of their Right Against Self-Incrimination by the Prosecutor's Argument to the Jury that They Should Have Cooperated with the Government, as did Barres, Instead of Protesting their Innocence.

The prosecutor argued in summation:

> " * * * . . . the Government did get the cocaine. So that has been protected from going out in the street. But now who holds the key to the funnel of cocaine up from Bolivia through this route? Who holds that key but Mr. Veciana? Let's remember that. Let's remember the different roles each of them played in this transaction. Veciana, the man who had the contacts in Bolivia; Pomares and Barres, the men who were going to sell it here. Remember, neither was going to talk about the people they dealt with. Each of them was going to have their separate function. So no one knows but Veciana. Only he knows who the sources are in Bolivia. So although we have stopped this shipment of cocaine this time, only Veciana could stop - by giving the Government the information, could stop the flow of cocaine up from Bolivia." (Tr. 618-619)

It is true that, at the request of the defense, the Court instructed the jury to disregard the prosecutor's argument. Nevertheless, the prosecutor immediately went on to comment:

> "With respect to Barres, he has cooperated with what he knew." (Tr. 619)

The defendants respectfully submit that the prosecutor's argument was an improper reflection upon the defendants' right to remain silent and right to stand trial. The harm having been done, the Court's instruction could not irradicate it. Moreover, in apparent disregard of the Court's ruling, the prosecutor went on to make what can only be construed as an unfavorable comparison between the stance of the defendants, in remaining silent, and the stance of the Government's key witness, in "cooperating." Such argument has been condemned as a violation of Fifth Amendment privilege. Deats v. Rodriguez, 477 F. 2d 1023 (10th Cir., 1973); People v. Christman, 23 N.Y. 2d 429, 297 N.Y.S. 2d 134 (1969).

The prosecutor's summation improperly distorted the testimony of the prosecution witness Lopez, to the prejudice of both defendants, and thereby converted that testimony into a violation of the rights of the defendant Pomares under Bruton v. United States, 391 U.S. 123.

Long after the arrests in this case, the defendant Veciana met with the Government witness Lopez, and they had a discussion with regard to the circumstances of the departure of Veciana and Pomares from the Florida apartment. An examination of the testimony and pre-trial statements of the witnesses Lopez and Figueroa fails to establish that Veciana endeavored to persuade Lopez to lie about those circumstances. Nevertheless, the prosecutor argued in summation:

> " * * * . . . now, if there were any confession of guilt, it's going to be a witness and trying to get him to testify that people left separately, when, in fact, they left together. Then, of course, Mr. Veciana said, 'but tell the truth. Tell the truth.' Mr. Veciana is no dummy. He is not going to tell him to lie. If he should

A 787

> get Mr. Lopez to say they left separately, that would put the lie to Barres because Barres said they left together, but they were going off to switch the cocaine. So you can see Mr. Veciana practically standing up and admitting by going to a witness and trying to get that witness just a few days before trial to testify that they left separately, when in fact, Lopez, Figueroa, and Barres said they left together." (Tr. 629)

Of course, there was no evidence that Veciana knew what Barres had told the authorities concerning the meeting and the sequence of departure. In any event, the Government argued that Veciana's post-conspiracy statements and activities were inculpatory. Since the event in question involved the interacting activities of Veciana and Pomares, an alleged admission of guilt by Veciana was necessarily inculpatory of Pomares. The argument in question was, therefore, a clear violation of Pomares' rights under Bruton, supra.

Defense counsel's efforts to have the problem remedied or corrected were denied (Tr. 653, 683). It is respectfully submitted that the prosecutor's argument was unfair to both defendants, and that the rights of the defendant Pomares to be confronted by and to cross-examine the witnesses against him were directly violated, thus requiring a new trial.

VII. In His Summation, the Prosecutor Became an Unsworn Witness Against the Defendants By Placing Before the Jury in Summation Alleged Facts which Were not Shown by the Evidence.

In his summation, in an effort to buttress the credibility and testimony of the witness Barres, the prosecutor argued that, "each detail" of Barres' statements to the authorities upon his arrest was thereafter corroborated by the evidence which the subsequent investigation uncovered. The argu-

ment was made with reference to those aspects of Barres' confession which inculpated the defendants on trial. Of course, Barres' post-arrest statements, i.e., prior allegedly inconsistent statements in this regard, were not the subject of trial proof by virtue of the defense objection (Tr. 261). Barres' pre-trial statements in this regard, i.e., inculpatory of the defendants, were not before the jury. In claiming that the statements made upon his arrest were corroborated by the Government's investigation, "in each detail", the prosecutor effectively placed hearsay before the jury in the form of his own unsworn testimony. A motion for a mistrial upon that theory was denied by the Court (Tr. 261, 624-625, 630, 652).

VIII. At trial, the Government Improperly Expanded the Scope of the Indictment to Cover Crimes not Charged in the Indictment. Moreover, the Defense was not Advised in Advance of Trial that The Government had so Expanded the Scope of the Indictment.

During the Government's opening to the jury, the defense and the Court were advised for the first time that the Government's case would include allegations that the defendants had engaged in substantial narcotics transactions prior to those specifically charged in the indictment. The Government's expansion of the indictment charges was all the more incredible in that the superseding indictment upon which the defendants were tried, had been returned just a few days before trial. It will be recalled, that a substantial part of the testimony at this trial by the witness Barres concerning transactions not included in the indictment. As soon as the Government's intention was revealed to the defense, a motion for a mistrial was made (Tr. 50), and that motion was renewed throughout the trial (Tr. 101,

527). Failing to have the evidence excluded, the defense unsuccessfully moved to have it stricken (Tr. 574). In an effort to justify its position to the jury, the Government improperly sought to "explain" the omission of these charges from the indictment upon the theory that the charges could not be made since the narcotics which form the subject matter of those transactions were not in the possession of the Government (Tr. 633).

In United States v. Byrd, 352 F. 2d 570 (2nd Cir., 1965), the Court of Appeals stated the long-standing rule which trial Courts must follow in exercising their discretion as to whether to admit or exclude evidence of a defendant's other crimes." The following words, as applicable to this case as to that, were used by the Court:

> "The exercise of discretion must be addressed to a balancing of the probative value of the proffered evidence, on the one hand, against its prejudicial character, on the other." (352 F. 2d at 574)

The Court in Byrd went on to specify an important factor to be used in weighing the admissibility of such evidence:

> "The ['other crimes'] evidence came from the mount of the same witness, Kaufman, who testified to the occurrences in the first two counts. If the jury believed his testimony as to those counts, the relating of the . . . [other crwminal] incident added little, if anything, to a revelation of Byrd's state of mind. If they had disbelieved Kaufman's testimony about the first two counts, it is not very likely they would have believed his story about the . . . [other criminal event]."

Here, it was Barres who testified to all of the transactions. Thus, the reasoning of Byrd is applicable here.

The Court of Appeals went on to note: "Another factor to be considered is whether the Government was faced with a real necessity which required it to offer the evidence in its

main case." 352 F. 2d at 575. Noting that the challenged evidence was offered on the question of the defendant's intent - - an issue which defendant had not yet "sharpened" - - and that the Government did not "suffer from a lack of evidence of intent", the Court of Appeals concluded: "There was therefore no pressing necessity that evidence of the prior occurrence be offered on the Government's main case" (352 F. 2d at 575).

Barres' testimony as to the transactions specified in the indictment left no room for the issues of intent, knowledge, or anything similar. The rule which ought to have been followed, therefore, according to the Court of Appeals, was summed up in Byrd at p. 575:

> "Where the prejudice is substantial and the probative value, through the nature of the evidence or the lack of any real necessity for it, is slight, its admission at that stage [i.e., during the Government's main case] may be held to be an abuse of discretion."

With respect to this same evidence, there is another fact which supports our request for a reversal - - the defendants were given no notice that such evidence was to be introduced against them until the Government opening, on the first day of trial. If one is to give even lip service to the presumption of innocence, it must be assumed that they knew nothing of it. [See, for example, the reasoning of Judge (later Mr. Justice) Whittaker in United States v. Smith, 16 F.R.D. 372 (W.D. Mo., 1954), where, ruling on discovery motions, he stated that the presumption of innocence obliged courts to assume that a defendant was unaware of the details of the crimes charged against him]. To announce for the first time during its opening that it intended to prove such an inflammatory in-

cident was to deprive them of an opportunity of defending against the charge and to engage in trial by ambush. The record contains no justification for the Government's failure, in one way or another, to give the defendants notice of its intention to introduce such proof.

IX. In View of the Purpose and Function of Cross-examination, and the Substantial Extent to Which the Government's Case Depended upon the Testimony of Barres, It was Improperly Prejudicial for the Prosecutor to Stand in the Midst of Cross-Examination and Characterize as "Preposterous" a Proper Question Thus Relieving the Witness of the Burden of Giving his Own Unguided Answer (See: Tr. 333)

X. The Defendants Were Deprived of a Fair Trial by the Prosecution's Failure, at the Conclusion of Direct Examination, to Alert the Defense to the Fact that the Witness Barres Claimed a Prior Inculpatory Written Statement of His Own and of the Defendant Pomares was in the Possession of the Government but Could Not be Located. The Error was Compounded when Barres So Testified Before the Jury.

As later conceded by the prosecution, it knew about Barres' claim before he so testified on cross-examination (Tr. 528-531). The defendants respectfully submit that, at the very least, they should have been alerted to the alleged existence of the missing document prior to cross-examination. If it did exist, it constituted a prior recorded statement of Barres in the possession of the Government (18 U.S.C. § 3500), and its non-existence may, as well, have constituted Brady information. Additionally, it was, if it existed, an alleged written statement of the defendant Pomares. Not having been alerted, there was no way to prevent Barres from blurting it out, as he did

(Tr. 328). The defense motion for a mistrial was denied (Tr. 344).

CONCLUSION

For all of the above reasons, the jury verdict should be set aside and a new trial should be granted to both defendants.

Respectfully submitted,

HENRY J. BOITEL
Attorney for Defendant
Ariel Pomares

New York, New York
March 11, 1974

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	
vs.	73 Cr 793
ANTONIO VECIANA and ARIEL POMARES, Defendants.	

March 13, 1974
11:10 a.m.

Before: HON. DUDLEY B. BONSAL,
District Judge

APPEARANCES

PAUL J. CURRAN, ESQ.
United States Attorney for the
Southern District of New York

BY: BANCROFT LITTLEFIELD, ESQ.
Assistant United States Attorney

BARRY GARBER, ESQ.
Attorney for Defendant Veciana.

HENRY J. BOITEL, ESQ.
Attorney for Defendant Pomares.

NORMA SELTZER, Spanish Interpreter

THE CLERK: Is the interpreter here?

MS. SELTZER: Yes.

(Norma Seltzer was sworn as the Spanish Interpreter by the Clerk of the Court.)

THE COURT: Before we proceed to sentence, --- sit down Mr. Pomares and Mr. Veciana --- before we proceed to the sentencing, I received a motion for a new trial from Mr. Boitel on behalf of both of the defendants. I didn't receive this until late afternoon the day before yesterday and the arrangement was, of course, it be done ten days ahead of the sentencing date. I understand this was due to the delay in getting the transcript?

MR. BOITEL: That is correct, your Honor.

THE COURT: I received this. I haven't received any answering papers from the government. Does the government wish to comment on this motion?

MR. LITTLEFIELD: No, your Honor, the government did not have time to file answering papers and, in fact, it is the government's position that all these motions had been ruled on at trial and if the Court wishes to hear argument on any specific one, the government is prepared to do that, but at this point I think we have been through each and every one of them at least once and I don't feel it is necessary to do it again.

THE COURT: All right.

I think the Bruton problem certainly was considered in considerable detail at the trial and I ruled on that and I did provide that any admissions received on behalf of Mr. Pomares would not in any way mention Veciana. I think that was done and I don't think there is a Bruton problem here.

I was satisfied from the testimony that --- and I think I had a hearing without the jury --- on the conditions under which Mr. Pomares' statements were made and I thought then and I repeat I thought they were voluntary.

The rest, I think, deals with the prosecutor's summation. I recall his summation. I think some of these points were not raised at the time, but on balance I don't think anything in his summation was so prejudicial as to require a new trial.

I think that, in general, covers your motion and I am going to deny your motion.

We will proceed to the sentences. I would like to say before considering each defendant, I think I would like to say two things to both Mr. Veciana and Mr. Pomares.

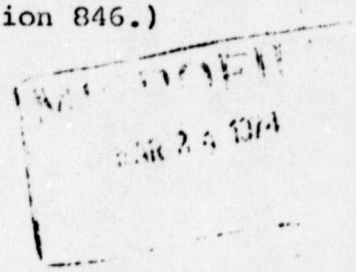
The first thing is that I have been very touched by the letters I have received from members of your family and your friends. I have read all of those letters, and it has been quite moving to me that they rallied the way they have and

JUDGMENT & COMMITMENT (VECIANA)

[Same Caption]

On this 13th day of March, 1974 , came the attorney for the government and the defendant appeared in person and[1] by Barry Garber, Esq.,

IT IS ADJUDGED that the defendant upon his plea of[2] not guilty and a verdict of guilty by a jury,
has been convicted of the offense of unlawfully, wilfully and knowingly distributing and possessing with intent to distribute a Schedule II narcotic drug, to wit, cocaine. (Title 21, U.S. Code, Sections 812, 841(a)(1) and 841(b)(1)(A).) ; conspiracy so to do. (Title 21, U.S. Code, Section 846.)



as charged[3] in counts 1 and 2
and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of[4] SEVEN (7) YEARS on each of counts 1 and 2, to run concurrently with each other.
Pursuant to the provisions of Section 841 of Title 21, U.S. Code, defendant is placed on Special Parole for a period of THREE (3) YEARS, to commence upon the expiration of confinement.

IT IS ADJUDGED that[5]

Pursuant to Section 4208(a)(2) of Title 18, U.S. Code, defendant shall become eligible for parole at such time as the Board of Parole may determine.

Defendant remanded in lieu of bail pending appeal fixed in the amount of $100,000.00.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Richard B. Rouse
United States District Judge.

The Court recommends commitment to[6]
Elgin Air Force Base, Fla.

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JUDGMENT & COMMITMENT (PAMARES)

[Same Caption]

On this 13th day of March, 1974 , came the attorney for the government and the defendant appeared in person and[1] by H. Boitel, Esq.,

IT IS ADJUDGED that the defendant upon his plea of[2] not guilty and a verdict of guilty by a jury, has been convicted of the offense of unlawfully, wilfully and knowingly distributing and possessing with intent to distribute a Schedule II narcotic drug, to wit, cocaine. (Title 21, U.S. Code, Sections 812, 841(a)(1) and 841(b)(1)(A).) ; conspiracy so to do. (Title 21, U.S. Code, Section 846.)

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as charged[3] in counts 1 and 2 and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of[4] FIVE (5) YEARS on each of counts 1 and 2, to run concurrently with each other.
Pursuant to the provisions of Section 841 of Title 21, U.S. Code, defendant is placed on Special Parole for a period of THREE (3) YEARS, to commence upon expiration of confinement.

IT IS ADJUDGED that[5]

Pursuant to Section 4208(a)(2) of Title 18, U.S. Code, defendant shall become eligible for parole at such time as the Board of Parole may determine.

Defendant is remanded in lieu of bail pending appeal fixed in the amount of $75,000.00.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Dick R. Bard
United States District Judge.

The Court recommends commitment to[6]

Clerk.

PAMARES REQUEST TO CHARGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA :

-against- : Indictment No. 73 Cr. 793

ANTONIO VECIANA and ARIEL POMARES, :

Defendants. : DEFENDANT POMARES REQUEST TO CHARGE

----------X

WEIGHT TO BE GIVEN ALLEGED ADMISSION

There has been evidence at this trial that, following his arrest, the defendant Pomares admitted to some extent that he participated in the transaction charged by Count 2 of the indictment. Whether or not he, in fact, made such an admission is a question for you to determine.

The defense has argued that the circumstances under which Mr. Pomares allegedly made the admission rendered the admission unreliable. The question of its reliability is also one for you to determine. As with all other evidence in the case, if you find that he did, in fact, make such an admission, you should give it such weight as you feel it deserves under all the circumstances. If you find that it is without reliability, you may disregard the alleged admission altogether. (Lego v. Twomey, 404 U.S. 477, 485-486; 18 U.S.C. § 3501[a]).

REPORT OF AGENT PINOL RE PAMARES STATEMENT
(HEARING EXHIBIT A)

August 2, 19..
DEA, San Juan, P. R.

CASE NO: C173-X107

Debriefing of Ariel Pomares Orbea

1 - On July 29, 1973 at approximately 12:15 p.m., DEA Special Agents Octavio D. Piñol, Vincent Di Stefano, Andres Amador Fortier, James C. Edwards and Police Officer John Bruno the last two officers from DEA Task Force, New York Group No. 2, arrested Ariel Pomares Orbea, at his residence at AY 12 - 38C Street, Valle Arriba Heights, Carolina, Puerto Rico.

2 - There Mr. Pomares was advised of his constitutional rights in spanish by SA Amador witnessed by SA Piñol. At the time of arrest, Pomares consented in writing to a search of his premises. No drugs or contraband were found.

3 - Pomares was transported to DEA District Office, San Juan, P. R., where he was again advised of his constitutional rights in Spanish by SA Piñol witnessed by SA Amador.

The following are the statements made by Ariel Pomares Orbea upon questions made by John Bruno, New York Police Office and SA James C. Edwards DEA, Task Force, New York Group #2 which were translated in Spanish by SA Octavio Piñol witnessed by SA Andres Amador of DEA San Juan District Office.

Q: Mr. Pomares you have indicated a willingness to cooperate.
A: Pomares answered yes.

Q: We would like to question you as to your role and the roles of Mr. Barres and Mr. Vesciana in the transfer and sale of ten kilograms of cocaine. Do you know Mr. Barres?
A: Yes, Mr. Barres is my boss at Freca Corp.

Q: Do you know Mr. Vesciana? How are you associated with him?
A; Yes, I know Mr. Vesciana. I met him through Mr. Barres.

REPORT OF AGENT PINOL RE PAMARES STATEMENT

Q: Mr. Pomares, beginning with early morning on Saturday, July 21, 1973. Can you tell us where you where? Who was with you?
A: I was in the apartment of Mr. Barres. Minutes later, Mr. Vesciana arrived at the apartment.

Q: During the time you were present with Mr. Barres and Mr. Vesciana at Mr. Barres' apartment did anybody come to visit Mr. Barres?
A: Yes, Mr. Lopez and his son-in-law came to Mr. Barres' apartment.

Q: When Mr. Lopez and his son-in-law came in, what did you and Mr. Vesciana do?
A: I left the apartment on my way to the Cross Inn Motel where my mother was waiting for me.

Q: When and where did you again meet Mr. Vesciana? What occurred at that time?
A: When I was pulling out from the parking lot of Mr. Barres' apartment parking lot, Mr. Vesciana called me and gave me two packages.

Q: After receiving these two packages, what did you do with them and did you know was in these two packages?
A: I put the two packages in the trunk of the rental car I was driving. Mr. Vesciana instructed me to deliver the two packages to Mr. Barres' apartment. At the time, I received the two packages, I did not know the contents.

Q: Did you contact Mr. Barres to tell him that Vesciana gave you the two packages? How did you contact him and from where?
A: I contacted Mr. Barres by telephone from the Cross Inn Motel. He instructed me to bring the packages to his apartment.

Q: After arriving at Mr. Barres' apartment, what did you do with the two packages?
A: I put the two packages on the balcony of Mr. Barres' apartment upon his instructions, and closed the sliding door after.

Q: What did you do after placing the two packages at Barres' apartment balcony?
A: Mr. Barres and myself went to the supermarket where he acquired a thermometer, plastic bags and a pecan pie.

Q: Who suggested the use of a thermometer to test the quality of the cocaine?
A: Mr. Barres suggested to use the thermometer.

Q: At what point did you know that the two packages that were given to you by Vesciana contained cocaine?
A: When Barres opened the two packages and showed it to me.

Q: We understand that after getting the thermometer and the plastic bags you and Barres returned to Barres' apartment.

Q: What did you and Barres do to the two packages given to you by Vesciana?
A: I helped Mr. Barres transfer the cocaine with a spoon from the two packages into one kilo plastic bag of 10 bags and weighed it.

Q: How did you weigh the packages? Who scale was it, how was it acquired?
A: Mr. Barres weighed the 10 plastic bags, I just helped him. About the scale, I do not know from where it came, the only thing I know is that I saw it at Barres' apartment and I told him that if it was a machine gun.

Q: After packing the ten kilos where were they placed?
A: In a bluish suitcase by Mr. Barres.

Q: Who's suitcase was it that the seven kilos were placed in? Describe how the seven kilos were wrapped?
A: My suitcase, the seven kilos were wrapped in plastic bags secured by masking tape.

Q: After completing the packaging, what happened to the remaining three kilos?
A: Mr. Barres asked me to help him move the stove which I did. Mr. Barres then placed the three kilos of cocaine there. Then I helped to move back the stove to the original place.

Q: What did you do after leaving Mr. Barres' apartment? What instructions did Mr. Barres give you? Did you have the suitcase containing the seven kilos of cocaine with you?
A: I took the suitcase containing the cocaine with me to Cross Ways Inn Motel where I was staying. Mr. Barres told me that the next day I would have to travel by train to New York bringing with me the suitcase with the cocaine.

Q: What date did you travel to New York from Miami, Fla.?
A: I traveled to New York by train on July 22, 1973 about 9:00 a.m., on the AMTRAK Train.

Q: When you arrived in New York, what did you do, who did you meet? Where?
A: I went to the Americana Hotel in New York. At the lobby, I met Mr. Barres and delivered the suitcase to him.

Q: What instruction did you receive from Mr. Barres?
A: Mr. Barres told me to leave the suitcase with him which I did.

Q: What did you do after learning of Barres' arrest?
A: I went to Miami by plane and went directly to the ~~airport~~ Dupont Plaza Hotel.

On July 29, 1973, Pomares freely stated that he was willing to cooperate in full extent of the whole operation of this case and to give and sign statements and also to testify in court.

On July 30, 1973, after Pomares was taken before the U. S Magistrate John M. Garcia, represented with his lawyer, Gustavo Del Toro, he refused to cooperate unless inmunity was granted to him. However, Counselor Del Toro informed me that if

inmunity was granted to Pomares, the information was so valuable that Pomares knows about the international trafficking of narcotics, including diplomats, names, places and also mentioned Bolivia, Paraguay and Nicargua.

Dest.
Region 2 (direct)